PERERA'S COLLECTION.

SUGGESTION.

"KANDYAN LAW."

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"In the notice which appeared in the "*Times*" of the twenty second instant "under this heading, some injustice was done to a work on "Kandyan Law" "published by *Mr. Perera* in 1860. This is certainly a very carefully written "work; and for the last twenty years has been of constant use as a work of "reference. During that period, however, there have been very many important "decisions, and a new edition embodying these judgments would secure a large "and rapid sale. We owe *Mr. Perera* an apology for stating, that there has "been no systematic attempt of a scientific arrangement of "Kandyan Law," for "in *Mr. Perera's* edition of *Armour*, we certainly have such a work. We trust "that the learned author will increase the debt due to him by the profession by "publishing another edition in which the decisions of the last twenty years will "be embodied." —*Ceylon Times, July* 31, 1880.

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1892

A COLLECTION

OF

SELECT DECISIONS OF THE SUPREME COURT

ON POINTS OF KANDYAN LAW

ALPHABETICALLY ARRANGED
UNDER THEIR VARIOUS HEADS
WITH EXTRACTS

FROM

D'OYLY, SAWERS, MARSHALL, THOMSON, SOLOMONS, SERVICE TENURE COMMISSIONERS' REPORTS,

AND

THE ORDINANCES

AS AN APPENDIX TO

PERERA'S REVISED EDITION OF ARMOUR

(Which will shortly be in the press)

BY

JOSEPH MARTINUS PERERA
SRIWARDANA

PROCTOR OF THE HON'BLE THE SUPREME COURT,
MEMBER OF THE CEYLON BRANCH OF THE ROYAL ASIATIC SOCIETY
AND CROWN PROCTOR, KEGALLE.

VOL. II

"——Saving to all classes of the people the safety of their persons and property, with their civil rights and immunities, according to the Laws, Institutions and Customs established and in force amongst them."—

Proclamation of the Kandyan Convention.

COLOMBO:
PRINTED AT THE "CEYLON EXAMINER PRESS", COMPANY (LIMITED.)
MDCCCXCII.

THIS VOLUME

IS BY PERMISSION,

RESPECTFULLY DEDICATED

TO

THE HONORABLE SIR B. L. BURNSIDE, Kt.

CHIEF JUSTICE

OF

THE ISLAND OF CEYLON.

BY

THE COMPILER.

PREFACE.

It was a long-felt want, which has not been attempted to be supplied, to have in a concise form, decisions on important points of KANDYAN LAW, from the published authorities.

The writer thought this, a good opportunity, whilst reprinting his *Armour* revised and corrected, to add a collection of select decisions of the Supreme Court on Kandyan Law, as an appendix to that volume; and, as it would be very convenient to have this collection separately bound, it was considered desirable to publish the same as a second volume to his new edition of *Armour*.

It has also been thought expedient to supplement the decisions of the Supreme Court from the Legal Reports and Circulars, with extracts from all the other principal works now extant on Kandyan Law,—such as, *D'Oyly*, *Sawers*, *Marshall*, *Thomson*, and *Solomons*, as well as from the *Service* and *Temple Lands Commissioners' Reports*, and the *Ordinances*.

These have been arranged under alphabatical headings for convenience of reference: thus,—

Chapter I—On Adoption.
Chapter II—On Deeds and Transfers.
Chapter III—On Marriage.
Chapter IV—On Priests and Temples.
Chapter V—On Rajakaria, or Service Tenures.

The Revised Edition of *Armour*, and this Collection of Decisions of the Supreme Court &c., will, it is hoped, meet with the approval of the Profession.

J. M. P.

Kegalla,
October 6, 1892.

ERRATA.

Page	XVI. *Line* 2	*For* PRIEST	*read* PRIESTS.	
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SELECT DECISIONS

OF THE

SUPREME COURT

ON

KANDYAN LAW.

CHAPTER I.

ON ADOPTION.

SECTION 1.

(From D'Oyly's Notes on Kandyan Law.)

Adopted child preferred to heir at Law.

1. *Tambane Mudianse, Purangwela Mudianse,* and *Naekkale Mudianse* were brothers. They had a sister married to *Kohukumbura Mudianse,* to whom she bore two sons, *Loku Mudianse* and *Kuda Mudianse. Tambane Mudianse* having no issue, adopted the daughter of his brother *Purangwela Mudianse,* and married her in *Binna* to the son of *Uduwala Mohattala.* Thereupon the sons of *Kohukumbura Mudianse* entered a protest, and set up a claim as presumptive heir to *Tambane Mudianse,* alleging that *Purangwela Mudianse* being then dead, his only child, the daughter aforesaid, should be content with his inheritance, and that *Tambane Mudianse's* estate should eventually devolve on his sister's sons, and not on the niece whom he had adopted. The plaintiffs were non-suited, and *Tambane Mudianse's* right to adopt his niece and constitute her his sole heiress, determined by the Judge.—*D'Oyly's Notes, p.* 18.

Adopted child preferred to heir at Law

SECTION 2.

(From Sawer's Digest on Kandyan Law.)

1. What is necessary to constitute adoption.—2. Public declaration.—3. Want of public declaration.—4. Rights of adopted children when patron has no issue.—5. When patron has issue.

What is necessary to constitute adoption.

1. The adopted child must be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the hereditary property of the parent.—*Saw: Dig; p.* 26.

Public declaration.

2. A regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of adopting parent's estate.—*Ib.*

Want of public declaration.

3. A child being reared in a family, even by a near relative, is not to be construed into a regular adoption without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property.—*Ib.*

Rights of adopted children when patron has no issue.

4. A regularly adopted child, if the adopted parent has no issue of his or her own body, inherits the whole estate of the parent adopting him or her; but should the adopting parent have issue, male or female, of his or her own body, in that case the adopted child will have but an inferior portion of the estate with the issue of the parent.—*Ib.*

When patron has issue.

5. The Chiefs are not prepared to say what proportion such share should bear to the share of one of the issue, but they think it should be a fourth of the share which falls to such issue.—*Ib.*

SECTION 3.

(From Marshall's Judgments.)

1. What is necessary to constitute adoption.—2. Public declaration.—3. Want of public declaration.—4. Rights of adopted children when patron has no issue.—5. When the patron has issue.—6. Adoption requires public declaration.—7. Deeds under adoption.

What is necessary to constitute adoption.

1. The adopted child must be of the same caste as the adopting parent, otherwise, he or she cannot inherit the hereditary property of the adopting parent.—*Mar: Judg: p.* 353, § 126.

Public declaration.

2. A regular adoption must be publicly declared

and acknowledged, and it must have been declared and generally understood that such children are to be an heir of the adopting parent's estate.—Vide sup : p. 117, where it is observed that declarations of deceased persons are often veiy material on questions of adoption.—*Ib.*, § 127.

Want of public declaration.

3. The fact of a child being reared in a family, even though a near relative, is not to be construed into a regular adoption, without its having been openly avowed, and clearly understood that the child was adopted on purpose to inheret the property.—*Ib. p* 353, § 128.

Rights of adopted children when patron has no issue.

4. A regularly adopted child, if the adopting parent has no issue of his or her own body, inherits the whole estate of the person adopting him or her.—*Ib.*, *p.* 352, § 125.

When the patron has issue.

5. But if the adopting parent have issue, male, or female, of his or her body, the adopted child will, in that case, have but an inferior portion of the estate with the issue of the parents. The Chiefs are not prepared to say positively, what portion such share should bear to the share of each of the real issue, but they think it should be one-fourth of such share. – *Ib.*, *p.* 352, § 125.

Adoption requires public declaration.

6. On the principle above laid down, that an adoption should be publicly declared: when it was attempted to establish a deed, the proof of which was unsatisfactory, and the only consideration stated for the instrument was alleged adoption of the person in whose favour it purported to have been executed, of which adoption no evidence was offered, the S. C. observed that the adoption, if it had really taken place, would be a fact of sufficient notoriety to make it capable of very easy proof, and in the absence of such proof concurred with the Court below, in considering the deed not proved. No. 1220 Ruanwella, 21st October, 1833 the adoption of a child, supposing the fact to be proved.—*Ib.*, *p.* 353, § 129.

Deed under adoption.

7. On the other hand, it may be established to form a good and valid consideration for an absolute gift or transfer, in favour of such adopted child : Thus, a plaintiff claimed certain land, by virue of a uterine gift from his uncle P. Ralle, which was proved, but the defendant claimed under a latter deed from the same person ; witnesses deposed that P. Ralle had first adopted the plaintiff's younger brother, who died, upon which he asked the mother of the children to be allowed to adopt the plaintiff, that she at first objected to this second adoption on the ground that she had already parted with one of her children ; and then that P. Ralle

executed the deed in favour of the Plaintiff, who lived with his uncle, till his death, and remained, in his house till after the funeral. The Court of Kurunegalla considering the deed to the Plaintiff to be one of those gifts which, according to Kandyan Law, are revocable at pleasure [vide supra. par. 46, where the extent of his power of revocation is discussed] considered that the defendant's deed being of the latter date, ought to prevail. The Supreme Court, however, on appeal, took a different view of this part of the case. That Court observed that if the account given by the plaintiff's witnesses, of the adoption of the plaintiff by P. Ralle, and of the circumstances under which the deed in his favour was given were believed, it would appear that it was only in consideration of this grant in favour of the plaintiff that his mother, who objected to the adoption on grounds so natural to a mother's objection, would give her consent to the removal of the plaintiff from her house to that of P. Ralle; that if this were so, a good and valid consideration had actually been given on behalf of the plaintiff by his mother, and that it would be difficult to imagine any cause which would have justified P. Ralle in revoking his first grant, except undutiful or ungrateful conduct on the part of his adopted son. No. 1,672. Kurunegalla 31st October, 1833.—*Ib. p.* 353, § 130.

Section 4.

(From Thomson's Institutes.)

1. What is necessary to constitute adoption.—2. Public declaration.—3. Want of public declaration.—4. Rights of adopted children when patron has no issue.—5. Where the patron has issue.—6. Adoption requires public declaration.

What is necessary to constitute adoption.

1. The adopted child must be of the same caste as the adopting parent; otherwise he or she cannot inherit the hereditary property of the adopting parent.—*Thom. Inst., vol.* II, *p.* 658.

Public declaration.

2. A regular adoption must be publicly declared and acknowledged; * and it must have been declared and generally understood that such children are to be heirs of the adopting parent's estate. The declarations

* But requires no deed. (13,071, *D. C. Kandy*; *Austin*, 51.)

of deceased persons are often very material on questions of adoption. *—*Ib., p.* 658

Want of public declaration.

3. The fact of a child being reared in a family, even though a near relative, is not to be construed into a regular adoption, without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property.—*Ib., p.* 658.

Rights of adopted children when patron has no issue.

4. A regularly adopted child, if the adopting parent has no issue of his or her own body, inherits the whole estate of the person adopting him or her.† — *Ib., p.* 657.

Where the patron has issue.

5. But if the adopting parent have issue, male or female, of his or her body, the adopted child will in that case have but an inferior portion of the estate, with the issue of the parents. The chiefs did not say positively what proportion such share should bear to the share of each of the real issue; but they think it should be one-fourth of such share ‡— *Ib., p.* 658.

Adoption requires public declaration.

6. On the principle above laid down, that an adoption should be publicly declared; when it was attempted to establish a deed, the proof of which was unsatisfactory, and the only consideration stated for the instrument was the alleged adoption of the person in whose favour it purported to have been executed, of which adoption no evidence was offered, the Supreme Court observed that the adoption, if it had really taken place, would be a fact of sufficient notoriety to make it capable of very easy proof, and, in the absence of such proof, concurred with the Court below in considering the deed not proved. No. 1,220, Ruanwelle, 21st October, 1833, the adoption of a child, supposing the fact to be proved.—*Ib., p.* 659.

Deed under adoption.

7. On the other hand, it may be established to form a good and valid consideration for an absolute gift or transfer in favour of such adopted child. Thus, a plaintiff claimed certain land by virtue of an uterine gift from his uncle, P. Ralle, which was proved; but the defendant claimed under a later deed from the same person. Witnesses deposed that P. Ralle had first adopted the plaintiff's younger brother, who died, upon

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* Affirmed in *Austin, pp.* 52, 64, 74. What constitutes adoption is a mixed question of law and fact. (28,190, *D. C. Kandy, Austin,* 202.)

† This does not apply to the Maritime Provinces. (240, *D. C. Tangalle,* 6 May, 1837; *Morg. D.* 153.

‡ In one case, one-third was decreed. (13,071 *D. C. Kandy; Austin,* 51.)

which he asked the mother of the children to be allowed to adopt the plaintiff; that she at first objected to this second adoption, on the ground that she had already parted with one of her children; and then that P. Ralle executed the deed in favour of the plaintiff, who lived with his uncle till his death, and remained in his house till after the funeral. The Court of Kurunegalle, considering the deed to the plaintiff to be one of those gifts which, according to Kandyan Law, are revocable at pleasure, considered that the defendant's deed, being of the later date, ought to prevail. The Supreme Court, however, on appeal, took a different view of this part of the case. That Court observed that if the account given by the plaintiff's witnesses of the adoption of the plaintiff by P. Ralle, and of the circumstances under which the deed in his favour was given, were believed, it would appear that it was only in consideration of this grant in favour of the plaintiff that his mother, who objected to the adoption on grounds so natural to a mother's objection, would give her consent to the removal of the plaintiff from her house to that of P. Ralle; that if these were so, a good and valid consideration had actually been given on behalf of the plaintiff by his mother, and that it would be difficult to imagine any cause which would have justified P. Ralle in revoking his first grant, except undutiful or ungrateful conduct on the part of his adopted son. (1672 Kurunegalle, 31st October, 1833.)—*Ib. pp.* 659, 660.

Section 5.

(From Solomon's Manual.)

1. Prevalence of practice in Kandyan district of adoption.—2. No formalities necessary.—3. Deed unnecessary.—4. Parties should be of same caste; adoption should be public; must be formally acknowledged.—5. Rights of adopted children. Adopted daughter will succeeded equally with daughter married out in Diga.—6. When gift of lands to adopted child must be by deed.—7. Adopted child preferred to deceased adoptive father's widow.

Prevalence of practice of adoption.

1. The practice of adopting children seems to have prevailed in the Kandyan provinces to a great extent, especially amongst those who possessed considerable landed property and had no relations of their own.—*Sol. Man., p.* 6.

2. There were no prescribed formalities or ceremonies to be gone through*, and it was therefore always difficult to prove the right of a person claiming property by adoption,—*Ib.*, *p.* 6.

No formalities necessary.

3. In adpting a child it was not necessary to execute a deed †, but certain general rules were to be observed before the right could be recognised.—*Ib p* 6.

Deed not necessary.

4. First, it was necessary that the person adopting and the child adopted should be of the same caste. ‡ The adoption should also be public and it must have been formally and openly declared and acknowledged §. A public declaration of the adoption seems to be indispensable, and without it, even permission to remain in the patron's house up to marriage there, and to manage the cultivation of his lands and to perform the Rajakariya service incidental thereto, would not confer upon a man the right of inheritance by adoption ‖ —*Ib. p.* 6.

Parties should be of the same caste.

Adoption should be public.

Must be acknowledged.

5. An adopted child inherits all the property of his patron if such patron has no children of his own ¶; but if he has children and no relationship exists between the patron and the adopted child, then the latter will not inherit **. Sawer in his Digest, however, says, that in such a case, the adopted child will be entitled only to a fourth part of the estate ††.—*Ib. p.* 6.

Rights of adopted children.

6. If the patron has children, a gift of land to the adopted child must be by deed ‡‡. If a man died leaving a daughter married in Diga and an adopted daughter, and the former remained with her father and rendered him assistance till his death, the property would be divided in equal shares between the two daughters .§§—*Ib. p.* 6.

When gifts of land to adopted children should be by deed.

7. A regularly adopted child will succeed to the deceased's estate in preference to his widow, brother and sister or uncle or aunt ‖‖. An adopted son and an adopted daughter married in Binna inherit the property of the deceased in equal shares ¶¶. If an adopted child die without heirs, the landed property which he

Adopted child preferred to adoptive father's widow.

* *Perera's Armour*, p. 38 § 10.
† 13,071, *Kandy*, *Austin*, p. 51.
‡ *Perera's Armour*, p. 38.
§ *Austin*, 52, 64, 74. *Perera's Armour*, p. 38. *Marshall*, 353.
‖ *Perera's Armour*, p. 38.
¶ 240 *Tangalla*, *Morgan*, 153.
** *Perera's Armour*, p. 39 § 13.
†† *Sawer*, 26.
‡‡ *Perera's Armour*, p. 40 § 14. 1,026 *Ratnapura*, *Morgan*, 153.
§§ *Perera's Armour*, 39 § 13.
‖‖ *Perera's Armour*, 39 § 13.
¶¶ *Perera's Armour*, p. 40.

inherited from his patron will revert to such patron's heirs. If he died leaving heirs, they would inherit the property. *—*Ib p.* 6.

SECTION 6.

(From Morgan's Digest.)

1. Adoption under Kandyan Law and Maritime Law.—2. Verbal bequest of land to adopted children.—3. Adopted children joined as administrators.

Adoption under Kandyan Law and Maritime Law.

1. Though in the Kandyan Provinces, on failure of children by birth, an adoption entitles the adopted child to the succession of the parents by adoption, to the exclusion of collaterals, it is otherwise in the Maritime Provinces, which are governed by the Law of Holland.—No. 240, *D. C. Tangalla* (J).—*Morg: Dig.*, p. 153 § 484.

Verbal Bequest of Lands to adopted children.

2. Where a party had transferred certain lands to his adopted children (plaintiffs) by a verbal bequest, which he had endeavoured to get reduced into writing, but died before it could be executed; *Held* that he had a right by Kandyan Law and Custom to make such a grant; but there being no writing to that effect, no action could be maintained thereon. (See Procl. of October 1820.) A distinction was, however, drawn between maintaining an action and defending it, and though the plaintiffs were held not entitled to claim possession of the lands under such a bequest, yet, if the other heirs (defendants) who might have disputed the grant had actually acquiesced in it and granted possession; then, the equity of the case being exactly the same whether the grant had been verbal or written, having once fulfilled their common ancestor and donor's pleasure, they were too late to recede from it. And the plaintiffs who had been proved to have been in possession of one of the lands for eight years, were held entitled to retain it, notwithstanding its being included in a previous deed of gift to one of the defendants.—No. 1026, *D. C. Ratnapura*, (J).—*Morg: Dig.*, p. 153 § 486.

Heirs when estopped from disputing.

Adopted children joined as administrators.

3. In a case from Ratnapura, where the fact of the adoption of certain children had been proved to the satisfaction of the Court; *Held* that there was no good reason why the adopted sons should not be joined with the widow in the administration of the husband's estate.—No. 4, *D. C. Ratnapura*, (M.)—*Morg: Dig.*, p. 73 § 304.

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* *Perera's Armour*, p. 41.

Section 7.

(From Austin's Appeal Reports.)

1. Adoption requires no deed ;—2. Adoption requires proof. —3. Adoption requires formal declaration.—4. Adoption requires public declaration and acknowledgment.—5. Adoption a mixed question of law and fact.—6. Adopted son entitled to administration jointly with his adoptive father's widow.

1. *South Court*. No. 13071. Plaintiff (the admitted only issue of the deceased Kiria) claims a certain land by right of her said father. Defendant in her answer states, (and on the day of trial proved,) that she (defendant) was born in her uncle Kiria's house, and that because his daughter the plaintiff, who is married in *deega*, would render her father no assistance, he adopted the defendant and had her married in *beena* in his own house. She therefore claims the land by right of adoption. The Court below was of opinion that adoption was not proved, and further that defendant had no Deed to show that she was adopted. Judgment therefore for Plaintiff. In appeal reversed. "The adoption *has* been proved, and the adopted child (defendant) is entitled to one-third of the inheritance. Decreed accordingly." *Per Oliphant*. *January* 21, 1841.—*Austin's Rep*. p 51. Adoption requires no deed.

2. *South Court*. No. 13371. *Held* that the alleged adoption has not been proved. "The laws of all countries which recognize adoption require some formalities, and it is laid down by Mr. Sawers, that *a regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate*,*—and he adds that *a child being reared in a family even by a near relative, is not to be construed into a regular adoption without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit his property*."† In appeal affirmed. *Per Oliphant*. *February* 5, 1845.—*Austin's Rep*. p 52. Adoption requires proof.

3. *South Court*. No. 15017. In this case adoption was pleaded, but the Court was of opinion that it had not been proved. "The laws of all countries which recognize adoption, the Roman, French, and Hindoo laws, and the laws of the Tamuls in Jaffna require Adoption requires formal declaration.

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* *Saw. Dig*. p 26.
† *Saw. Dig*. p 26.

certain formalities to be observed in so solemn an act as that of adoption. The laws of Kandy also according to Mr. Sawers * require a formal declaration of the adoption, which in the present case has not been proved." In appeal affirmed. *Per Carr. October* 9, 1844.—*Austin's Rep.* p 64.

Adoption requires public declaration and acknowledgment.

4. *South Court.* No. 15769. Plaintiff as the widow of the deceased proprietor sued the defendant, who was his brother and heir-at law, to recover possession of her husband's lands. Intervenient claimed by right of adoption. Defendant denied the adoption, and with regard to the widow admitted that she was entitled to *maintenance* from the produce of her husband's lands, but not to the *absolute possession* thereof. The Court below held that Intervenient failed to prove his adoption. " The laws of all countries which recognize adoption require the act to be done publicly, and sometimes to be attended with certain solemnities. Mr. Sawers says, that according to Kandyan law, *a regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate* † And again, *a child being reared in a family, even of a near relation, is not to be construed into a regular adoption without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property.* In this case there is no evidence of any such public declaration or acknowledgment,—no calling together of any Headmen, nor even of relations or neighbours, but merely of vague expressions made use of in the presence of two or three casual visitors. It is considered and adjudged that the intervenient's claim be dismissed; that the defendant as brother and next of kin to the deceased be entitled to the lands mentioned in the Libel, subject, however, to the life-interest of the plaintiff, who is entitled to *possess* the same and enjoy the produce thereof during her life time." In appeal affirmed. *Per Stark. March* 9, 1846 —*Austin's Rep.* p 74.

Adoption is a mixed question of Law and fact.

5. No. 28190. In this action, which was for the recovery of certain lands, the plaintiff filed an affirmation of her own and two other parties, to the effect that defendant was not possessed of any property which would enable him to satisfy a judgment for the rents and profits, if the plaintiff should obtain such judgment; and that the defendant was committing waste and damage

* *Saw. Dig.* p 26.
† *Saw. Dig.* p 26.

to the property of which the plaintiff was the rightful owner. Hereupon the Court granted a Sequestration, against which Order defendant appealed, upon the grounds that it did not appear upon oath that any amount was due to plaintiff by way of rents and profits; and that the affirmation of plaintiff was contradicted in all material points by the defendant. The Supreme Court set aside the Sequestration, without prejudice to the plaintiff applying for an Injunction. *Collective. January* 15, 1856.

When the case subsequently came on for trial, plaintiff was non-suited, as she had admitted that her daughter was adopted by the deceased, under whom she claimed in the Libel. In appeal *set aside* and case remained for further evidence and judgment *de novo.*

"The Supreme Court is of opinion that plaintiff is not barred by her statement as to the adoption of her child, from showing her own right. What constitutes adoption is a mixed question of law and fact, and a party may well be mistaken in making any assertion in respect of it. The District Court has found that the plaintiff has established her relationship to the deceased, and she would be entitled to recover against the defendant unless he shows a better right." *Collective. March* 2, 1860.—*Austin's Rep.* p 201.

Adopted son entitled to administration jointly with his adoptive father's widow.

6. No. 9564. In this case the Court below allowed the widow in preference to the nephew to take out Letters of Administration of the Estate of the deceased. In the course of proceedings, mention was made of an adopted son of the deceased (a minor), but nothing transpired in the judgment with regard to him. The nephew appealed, and in appeal, "Affirmed as to the Grant of administration to the widow, except that the said Grant shall be expressly limited to whilst she remains unmarried; and a power shall be reserved therein for the son alleged to have been adopted by the deceased, being hereafter joined in such administration with the widow upon his attaining his majority, and satisfactorily proving to the Court that he was really the adopted son of the deceased. Upon investigation, this Court does not consider there are any proofs of fraud in the omission to file the inventory of moveables, or in the production of the Will by the widow, to warrant its refusing to her Administration,—it appearing that the above omission in the Inventory was owing to her ignorance, and her having a customary title to the moveables; and that the Court disallowed the Will, as the deceased was at that time a convict for Treason, and therefore unable to make any Will. In regard to the general right of the

widow to administration, this Court has upon previous instances granted joint administration to the widow and adopted son ; and it entertains no difficulty in saying that the widow is entitled to preference therein, both as regards general principles, and established practice, as well as under the Kandyan Law which gives the widow control over the Estate whilst she remains unmarried. Consistently with this customary law, however, this Court considers that all such Grants to widows should be expressly limited to during the time that the widow remains unmarried." *Per Jeremie. September* 3, 1838.—*Austin's Rep.* p 233.

SECTION 8.

(From Beven & Siebel's Appeal Reports.)

1. Declaration of adoption sufficient.—2. Claim under adoption ; adoption a mixed question of Law and fact.—3 proof of adoption when inadmissible.

Declaration of adoption sufficient.

1. No. 29605. In this case, the question for consideration was, whether a declaration of adoption in a deed not contemporaneous with the act of adoption is sufficient, without other evidence, to prove adoption. The District Judge having held that it was, an appeal was taken, but his judgment was affirmed.—(23rd July, 1860). *Bev. & Sieb. Rep.* p 61.

Claim under adoption.

2. No. 28,190. In this case the plaintiff, as maternal cousin and next of kin of *Atteregama Basnaike Nilleme,* (whose mother and plaintiff's mother were uterine sisters) claimed certain lands, the paternal property of the *Basnaike Nilleme.* The defendant denying plaintiff's relationship asserted right to the lands as nephew and adopted son of the *Nilleme,* their fathers being brothers and joint owners. On the 6th January 1857, plaintiff was non-suited on the ground that she failed to make out that she was next of kin of the owner. This judgment was by consent *set aside* by the Supreme Court and the case sent back for a new trial. In 1859 the case was heard a second time, when the plaintiff was non-suited on the grounds that she was out of Court, having admitted that her daughter had been adopted by the *Basnaike Nilleme,* and that one *Kotagaloluwe Unnanse,* whose maternal grand-mother was uterine sister to the deceased, was next of kin. This judgment was set aside in the following terms by the Supreme Court (2nd March, 1860) : " The Supreme Court is of opinion

that the plaintiff is not barred by her statement as to the adoption of her child from shewing her own right. What constitutes adoption is a mixed question of law and fact, and a party may well be mistaken in making any assertion in respect of it. The District Court has found that plaintiff has established her relationship to the deceased, and she would be entitled to recover as against the defendant, unless he shews a better right The priest refered to, *Kotagaloluwe Unnanse*, should have an opportunity to intervene and establish his right, if he have any, to the estate, to enable him to do which a copy of this judgment should be served on him by the District Court. The case has been heard three times, and yet there is no judgment on the merits upon evidence. The defendant might have prevented this by entering into evidence and showing his right, and it is because he failed to do so that he is cast in the cost of the present appeal."

Adoption a mixed question of Law and facts.

The *Unnanse* intervened as adopted son of deceased and issue of his paternal cousin, and in 1861 the case was reheard. The District Judge considered that the plaintiff had not made out her title; that taking defendant's evidence to be true, yet " that no act was done by *Atteregama Basnaike Nilleme*, which by Kandyan Law would justify the Court in holding him to be the adopted son. There has been no publication such as the Kandyan Law requires, and no express recital in any deed." The Court found for intervenient, and as regards the objection that a priest cannot inherit, thus expressed itself: " A priest being a member of a family would appear not to have a right to inherit from the father, share and share with his brothers, but there is nothing to interfere with his rights of inheritance in other respects." On appeal by the plaintiff the judgment was affirmed. (*5th November*, 1861).—*Bev. & Sieb. Rep.* p 26. 27.

3. In the goods of *Juanis Gomes*.—No. 390. In this matter, the second applicant for letters applied to have his witnesses examined by Commission in Colombo. The Court (*E. H. Smedley*) allowed the appllication on two grounds (1). That the production of the old Registers and Thombos would be attended with inconvenience; and (2) that the Ordinance No. 3 of 1846 § 7 repealed the old rule § 26 § 21 made law by the Ordinance No. 8 of 1845 § 4. In appeal *Affirmed*. (17th January, 1861.)

Proof of Adoption when inadmissible.

The case then came on for hearing on the merits: *Vanderwall* for first applicant, submitted that he was

entitled to adduce oral proof as to the adoption of the first applicant by deceased. But the Court below held that he was not entitled to do so, and committed letters to second applicant who was proved to be the nephew of the intestate. The first applicant appealed on the following grounds: (1) That though the deceased was a native of a maritime province of this island, yet having acquired a new domicile in Kandy by long residence and abandonment of his domicile of origin, the right of succession to his property should be regulated by Kandyan Law. (2) By Kandyan Law an adopted son was entitled to succeed to his adoptive father's property in preference to all his relatives in the ascending or descending line, except his issue. (3) The intestate having died without issue, the applicant, as his adopted son and heir-at-law, was entitled to administer his estate in preference to the second applicant who was only his nephew. (4) It was not necessary either by Kandyan Law or Legislative enactment that adoption with a view to inheritance should be proved by deed or written declaration; all that the law required was that the intention should be proved by satisfactory evidence, which the first applicant was prepared to do.

In appeal, the decision of the Court below was *affirmed*. (14th May 1862.)—*Bev.* & *Sieb. Rep.* p 33.

Section 9.

(From the Legal Miscellany.)

1. Clear proof of adoption required to succeed as an heir.—2. Kandyan Law of adoption; adopting parent and adopted child must be of the same caste; adoption must be openly avowed.

Clear proof of Adoption required to succeed as an heir.

1. No. 3,569. *D. C. Colombo*.—There are no prescribed forms of adoption under the Kandyan Law, which are, nevertheless, very strict in requiring clear proof of the adoption being openly declared, and recognized in such a manner as can leave no doubt of the adopting party's intention that the child adopted should thereby succeed as an *heir* to the estate of the adopting parent. Thus, it has been held, though a child may have been reared in a family, and contracted marriage, and dwelt with his wife in the house of his patron, and cultivated his lands, yet such circumstances alone would not be construed into a regular adoption, unless it could be also shewn that by agreement with the natural parents of the

child on its removal, or by subsequent declarations and acts of the adopting party, a clear intention was manifested by him to adopt the child as his own son, and to make him an heir to his estate. *January 14th, 1843.* (C).—*Leg Mis.* p. 347.

2. No. 3,569 *D. C. Ratnapura.* (See *ante* 14*th January*, 843). The local law applicable to this case is contained in the following words of Mr. *Sawer* in his Kandyan Laws p. 26.

Kandyan Law of adoption.

"A regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate."

"The adopted child must be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the hereditary property of the parent."

Adopting parent and adopted child must be of the same caste.

"A child being reared in a family, even if a near relative, is not to be construed into a regular adoption, without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property." *February* 4*th*, 1846 (S).—*Leg. Mis.* p 421.

Adoption must be openly avowed.

Section 10.

(From Grenier's Appeal Reports.)

1. Adoption under Kandyan Law.—2. What is necessary and sufficient to constitûte adoption.—3. No special formalities prescribed by law.

1. *D. C Kandy*, 53,309. The following judgment of the learned District Judge (*Cayley*) explains the case:—

The only question in this case is, whether the 1st defendant had proved she was adopted by the deceased Basnaike Nillemey, through whom both parties claim the property in dispute. I have no reason to doubt the evidence of Nugawella Ratemahetmeya, corroborated as it is to a certain extent by the Dewe Nilleme; but the question still remains whether this evidence is sufficient to prove a legal adoption. It is proved that the Basnaike Nillemey had no children of his own, that the 1st defendant, his niece, lived with him from childhood, that he procured both her first and second husbands for her, and that when her hand was solicited by Nugawella for his son, the Basnaike Nillemey stated that he had adopted her, that he wished her to inherit his lands, and that accordingly he objected to her being married in Deega.

Adoption under Kandyan Law.

It is also stated that the 1st defendant was always recognized by the family as the adopted daughter of the Basnaike Nillemey.

What is necessary and sufficient to constitute adoption.

2. The requisites of a valid adoption appear to me to be correctly summarized in Mr. Solomons' "Manual of Kandyan Law," (p. 6), and it appears from authorities there cited, that to constitute a valid adoption, no particular formalities or ceremonies are prescribed, but it is necessary that the person adopting, and the child adopted should be of the same caste, and that the adoption should be public and formally and openly declared and acknowledged. The adoption here was openly declared and acknowledged, but the question is whether the declaration was sufficiently formal and public. In 15,769, D. C. Kandy. (Austin p. 74) it was laid down that the adoption should be openly avowed : and that it should be clearly understood that the child was adopted on purpose to inherit the adoptive parent's property. This seems to have been the case in the present instance. But the judgment of the Court below in the case, 15,769, held, that there was no evidence of any "public declaration or acknowelgment—no calling together of any Headmen, not even relations or neighbours, but merely of vague expressions made use of in the presence of two or three casual visitors;" and on this ground it was held that the adoption was not proved. This decision does not go so far as to determine that there must be evidence of a calling together of Headmen, or of relations and neighbours in order to prove a valid adoption. This would be opposed to the established principle that no special formalities are prescribed. It merely shows that some kind of public declaration and acknowledgment is required and instances of calling together of Headmen or relations as a suitable mode of effecting such publicity. In the present case, there were no mere vague expressions made use of by the adopting parent in the presence of two or three casual visitors as in the case 15,769; but, when the hand of the 1st defendant was formally sought in marriage from the Basnaike Nillemey, he declined the alliance on the ground that he had adopted her, that he wished her to live with him and inherit his property, and consequently that he objected to any Deega marriage for his niece. This was certainly a formal declaration of the adoption, though it is not proved that it was made after a calling together of Headmen or relations (though probably it was made in the presence of many of the latter), for the 1st defendant was always recognized by the family as the Basnaike Nillemey's adopted daughter.

3. There being no special formalities to constitute a valid adoption prescribed by the law, some kind of public declaration only being required, and as it appears that the Basnaike Nillemey himself always considered the 1st defendant to have been adopted by him, and stated such to be the case at an important family discussion, and that the relatives always recognized the 1st defendant as his adopted daughter: I think that it may be presumed that the adoption was sufficiently declared and made public to satisfy the requirements of the Kandyan Law, with which these people must be supposed to have been acquainted. It is also to be observed that the adoption was in every way natural and suitable. The 1st defendant was niece of the Basnaike Nillemey, was brought up by him in his house, was twice given in marriage by him; and the Basnaike Nillemey himself was childless. Judgment will be given for the 1st defendant with costs. The Kurunegala case, for the production of which this judgment was postponed, is not forthcoming.

No special formalities prescribed by law.

In appeal, (*Kelly* for appellant, *Ferdinands* for respondent) per CREASY, C. J.—" Affirmed for the reason given in the judgment by the Court below."—*Gren*: *Rep*: 1873. Part iii. pp. 117—119.

SECTION 11.

(*From RamaNathan's Appeal Reports.*)

1. Adoption requires clear proof.—2. What is not sufficient to constitute adoption.—3. Evidence of adoption in Kandyan Law.—4. Requirements of Kandyan Law as to adoption.

D. C. Colombo, No. 3,569. } *Wedda* v. *Balia.*

1. *Carr,* J.,—Remanded for the case to be heard *de novo*. The defendant has not satisfactorily made out his case, as the facts deposed to by his witnesses are not conclusive. For instance, though the defendant and the deceased respectively addressing each other as " father" and " son" is one of the strongest facts proved, yet such expressions amongst Kandyans of the same caste are not uncommon between any old and young persons living together, or intimately known to each other.

Adoption requires clear proof.

2. There are no prescribed forms of adoption under the Kandyan Law, which are, nevertheless, very strict in requiring clear proof of the adoption being

What is not sufficient to constitute adoption.

openly declared and recognized in such a manner as can leave no doubt of the adopting party's intention, that the child adopted should thereby succeed as an *heir* to the estate of the adopting parent. Thus, it has been held, though a child may have been reared in a family, and contracted marriage, and dwelt with his wife in the house of his patron, and cultivated his lands, yet such circumstances alone would not be construed into a regular adoption, unless it could be also shown that, by agreement with the natural parents of the child on its removal, or by subsequent declarations and acts of the adopting party, a clear intention was manifested by him to adopt the child as his own son, and to make him an heir to his estate.—*RamaNath Rep*: 1843—55. p. 1.

Evidence of adoption in Kandyan Law.

3. Plaintiff, as adopted son of Pina Veda and Lapee, deceased, claimed certain lands which defendants kept possession of, as the only heirs and next of kin of the said Pina Veda and Lapee.

A third party also intervened in the case, claiming the lands in question as another of the adopted son of the said deceased.

The plaintiff in support of his allegation adduced oral evidence and put in evidence deed A and case No. 694 of the District Court of Ratnapura, in which the supposed adoptive parents had admitted that they had a 'son named Unga' (or the plaintiff). These circumstances, it was contended, added to the fact that the deceased had no children, and that the plaintiff was their nephew, proved the adoption. But the learned D. J. held as follows :—

The evidence has not established the alleged adoption of either plaintiff or intervenient. It is, to say the least, weak and insufficient to constitute adoption. The deed letter A, which is virtually a deed for assistance, speaks of plaintiff, not as adopted, but *as if* adopted. Hence the reason for the deed, a fact at once shewing that there could have been no real adoption, but only a mere bringing up (but not from childhood, which is important) of the plaintiff, and theretore also the allusion to him in the former case of Pina or Lapee as their son. Case dismissed with costs.

On appeal, affirmed, (*Grenier* for respondent) D. C. Kegalla, 2965.—*RamaNath Rep*. 1877. p. 59.

August 21st, 1877.—*Present*, *Lias*, J :—

Requirements of Kandyan Law as to adoption.

4. The plaintiffs, as nephew and grand-nephew of one Dingiri Appoo, who had died intestate in or about the year 1870, claimed to be heirs at Law by adoption of the deceased. The defendant, who was administrator

of the intestate, denied the alleged adoption, and set up title by inheritance in himself and his sister Punchy Menika, as the children of the deceased by an associated marriage. On the issues thus raised, the parties proceeded to trial, and the learned District Judge (*Lawrie*) upheld the plaintiffs' right in the following judgment, which explains the facts of the case :—

" The defendant is the administrator of the estate of Diogiri Appoo, and by the decision of the Supreme Court, 2nd February, 1875, it has been expressly determined that by a grant of administration to him, the question of who are the heirs is left open, because that grant was come to summarily for the purposes of the administration and cannot prevent the parties from proving by a separate suit the adoption or associated mariage upon which they rely. Accordingly the two relations of the deceased who claim as his adopted sons raised this action in March 1875 against the administrator, calling on him to transfer to them the estate in his hands. The administrator in his answer admits that the plaintiffs were related to the deceased, but denied that they were adopted by him, and also denied that they were entitled to any share of the estate because they were descended from the deceased's sister, who had been married out in Deega.

" The defendant further averred that he and his sister are the children of the deceased, the issue of a marriage in which he was one of the associated husbands. During the pendency of the suit two or three petitions to intervene have been presented. The rights of those intervenients may be reserved. The defendant did not call any evidence either to rebut the proof led by the plaintiffs, or to substantiate his own averments. He satisfied himself with maintaining that the plaintiffs had not made out their case, and that their action should be dismissed. From time to time hopes were entertained that the parties might settle and consent to a division of the estate. I may say that I personally was anxious that they should do so and so end the strife, because I am well acquainted with the second plaintiff and also with the son-in-law of Punchy Menica, the defendant's sister. Both of them were often at my house, and made silver things for me, and I feel that it will be difficult for either of them to understand that my decision has nothing to do with my preference for the one over the other. Besides, I think that this is a case of some difficulty and novelty which is likely to be taken to the higher Court, and I should be sorry to see

the estate much diminished by a protracted law-suit. For these reasons I had hoped that I would be spared what I feel to be the rather disagreeable duty of deciding this case, and the estate spared further loss by an amicable arrangement. But this has not been found practicable. The evedence, particularly that of the second plaintiff, was given so moderately, and was so free from exaggeration, that I believe it to be true. Not only did the evidence strike me as true, but as the defendant did not impugn or attempt to contradict it, I am bound to accept it and to give it judgment for the plaintiffs unless it is insufficient in law. Of course, only the facts which I must accept, not the conclusions which the plaintiffs and the witnesses draw from these facts. I think, to begin with, that it is proved that Dingiri Appoo was childless. In the testamentary case, I held that the defendant was not his son, and I have no evidence before me now that he was. It is proved that the first plaintiff is his nephew, that his mother died in Dingiri Appoo's house, when the first plaintiff was very young, and that from that time he was brought up by his uncle; that he was fed and taught by him, and that his uncle got him a wife whom he conducted to the house, and that he lived with his uncle until his death. It is also proved that the second plaintiff was a grand nephew of Dingiri Appoo's and was born in his house; that when his parents went to Hewaheta he was left behind and was brought up and sent to a Pansala and taught silversmith's work by the deceased Dingiri Appoo, and that he lived with him until his death. It is further proved that Dingiri Appoo's widow regarded the second plaintiff as her adopted son and granted a deed to him in which she so styles him. A witness drew from these facts a conclusion that the plaintiffs were adopted by Dingiri Appoo. But the defendant says these are not sufficient, because it has not been proved that Dingiri Appoo ever publicly declared the plaintiffs to be his adopted sons. Now, it is necessary to determine whether a public ceremony or declaration is necessary to constitute adoption, or whether it is only proof of it. If the tie of adoption, like that of marriage, can only be formed by a formal declaration, it must be conceded that the plaintiffs have not proved they were adopted; but if, on the other hand, a public declaration is only proof of adoption, then it becomes a question whether that is the only proof or whether other evidence may not be received. It is, I think, quite certain that the public declaration does not constitute adoption. There have been

several cases in which the declaration which has been held sufficient was made for some other purposes. For instance, in the case 53309, the declaration that the girl had been adopted was made as a reason why she should not contract a certain marriage. It was not said that that statement created a tie which did not exist before. The girl had been adopted long before, but no circumstances had occurred which made it suitable or necessary that the fact should be publicly announced beyond the family-circle. There have been cases in which the statement in a deed that the grantee is the adopted son of the grantor had been held sufficient to prove adoption, though I imagine it could not be contended that it created a relationship. In *Armour* (Perera's edition, page 32) it is laid down that there are no prescribed forms and ceremonies of affiliation, and therefore it is not practicable to ascertain in every instance whether an orphan child or a child who was removed from the parent's care in its infancy, and who was educated by another person, was merely a foster child or protege of that person, or whether the said child was adopted and affiliated by that person. From the cases I have spoken of, and from this and other passages, I think it is quite certain that adoption can be constituted not only without a ceremony, but also without any words addressed by the adopter to the adopted child. If it is sufficient that the adopter make the declaration to others, and that he need not make it in presence of or to the child, then, I think, it follows that the declaration is merely proof and not the constitution of the adoption. *Armour* (Perera's edition, page 38) goes on to say, however, this much is certain. that unless the child and the person who had brought up and educated that child were of the same caste, and unless that person had publicly declared that he adopted that child and resolved that the said child should be an heir of his estate, the child will not be recognized as adopted and affiliated. I think this law is somewhat antiquated, for though the first of these conditions, sameness of caste, is present in this case (as I had occasion to say in another case 63c38), it is a condition to which no effect can be given in our Courts If there be proof that a person intended to adopt, and did adopt, a child of a different caste than his own, no Courts would now step in to insist on a distinction of caste which the adopter had himself ignored. Then as to the publicity of the declaration, can it be maintained that a public declaration is necessary, after the decision of the Supreme

Conrt in the cases 53309 and 55778. In the one case, the declaration was only a conversation between the adopter and another Chief who had come to solicit the child as wife for his son. In the other case, the decla ration was made when giving instructions to draw up a deed of gift. I think these cases warrant the conclusion that a public declaration is not necessary. But is it the Kandyan Law that there must be even a private declaration by the adopter? I shall assume for a moment that it is, and I find in this case the uncontradicted evidence of the second plaintiff, that the deceased called him son and that he told him to take care of the lands, and that there is no one else who will get them. I am entitled to hold it proved, because, as I said, there is no contradiction of this, that the conduct of the deceased to the plaintiffs was a continual declaration by acts, though not by words, that they were his adopted sons and heirs. It is consistent with Kandyan Law to infer adoption from facts and circumstances, apart from declarations by the adopter. The authority for that is the 12th section of *Armour* (Perera's edition, page 39), where it is said that certain given facts will warrant a conclusion that the deceased had decidedly adopted his daughter-in-law. These facts did not include a declaration by the adopter, but describe as nearly as may be the position of the first plaintiff, for he was married and settled in the deceased's house and rendered him asistance till he died. The deceased Dingiri Appoo was held a childless man, and if he was childless, there is no presumption against the adoption averred by the plaintiffs. On the contrary, it is highly unlikely that he intended his lands and goods to be divided and scattered among a numerous clan of relations there is in the Kandyan Districts. I think a presumption in favour of adoption is, when a childless man or woman has reared and maintained one or more of their relations in his house. Many people have a dread of speaking about their death and what shall be done with their property after it. Dingiri Appu may have been such a man, but I have little doubt that he felt satisfied that his property would go to the two plaintiffs who had lived from infancy under his care and who owed everything to him. I admit that this decision goes further than any other case I know, in admitting general proof of adoption, but I think it is founded on what may be fairly inferred from the recent authorities that it is not inconsistent with Kandyan Law or feeling, and it is in accordance with the justice of the case. I mean by that that by it the

estate of the deceased goes to those whom he intended should get it. Judgment for the plaintiffs for the estate of the deceased with costs.

On appeal, *Grenier* for the defendant and appellant, argued on the facts and cited Austin, 52, 61, 71, Solomons, 6, Marshall, 354, Sawyer, 46, *D. C. Kandy*, 28,190, Appendix to Sawyer's Digest, 61, *D. C. Kegalla*, 2605, Civ. Min March 6, 1877.

Ferdinands, *D Q. A.* (*VanLangenberg* with him) for plaintiffs and respondents, replied on the facts and cited Marshall, 347, Armour, 135,* 3, Grenier D. C. p. 117.

Cur adv vult.

And this day *Dias, J.*, delivered the judgment of the Supreme Court as follows :—

Set aside and plaintiffs non-suited with costs. The question in this case is whether the plaintiffs are the adopted children of one Dingiri Appu. The evidence is very meagre and does not establish the requirements of the Kandyan Law as to adoption. D. C. Kandy 64,536. —*RamaNath*. Rep. 1877, *pp.* 251—255.

(From the Supreme Court Circular.)

SECTION 12.

Adopted child's brother when preferred to adoptive parent's heir at law.

One W. Hamy adopted one Appu, and in 1856, conveyed the land in question to Appu Appu died leaving no issue. After Appu's death the land passed into the possession of Appu's widow (first defendant), and second defendant who claimed to be an adopted child of Aappu.

Adopted child's brother when preferred to adoptive parent's heir at law.

Plaintiff, as heir-at-law of W. Hami, brought ejectment, against defendants for the land. Plaintiff denied that second defendant had been adopted by Appu, and contended that first defendant had forfeited all right to enjoyment of the land by a diga mariage.

At the trial, plaintiff admitted the existence of a brother of Appu's, named Punchirala.

The District Judge found upon the evidence that second defendant had not been adopted by Appu, and that first defendant had, after Appu's death, married in diga. On these findings the District Judge gave plaintiff judgment for the land.

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* *Perera's edition, p.* 40.

Defendants appealed.

Grenier, for plaintiff, respondent.

On the 16 November, the following judgment was delivered :—

Curia, per CAYLEY, C. J.—Plaintiff claims certain land as the only son and heir of one W. Hamy. Defendants admit that the land belonged originally to W Hamy, but allege that by a deed of gift dated 10th. December, 1856, he conveyed the land to his adopted son, M. Appu, who held the land until his death, about ten years ago, when it devolved upon his widow, the first defendant, and his adopted son, the second defendant.

This deed of gift was not disputed, and the adoption of M. Appu by Hamy is admitted by the plaintiff.

The District Judge finds that first defendant is the widow of M. Appu, but is not satisfied that the second defendant was adopted by M. Appu ; and has accordingly given judgment for the plaintiff as the hier of Appu's adoptive parent, W. Hamy. It appears, however, that Appu left a brother Punchirala, and it is only when an intestate person leaves no near relations that the property, which he acquired from his adoptive parent, reverts to the adoptive parent's heirs.

The passage in *Perera's Armour* relating to this subject (p. 41) is as follows :—

" A person having died intestate leaving no issue, the landed property, which he or she had by gift or by inheritance from an adoptive parent, will revert to that adoptive parent's heirs or descendants, in case the deceased left not any near relatives. But if the deceased's father or mother, brother or sister, or other issue survived, in such case the said property will devolve to deceased's next of kin, and will not revert to the heirs or descendants of the deceased's adoptive parent."

[Solomon's Kandyan Law, page 7, will be found an authority to the same effect.]*

The plaintiff, therefore, having disclosed no title at all, cannot recover in ejectment against the defendants who are in possession, however weak their title may be, and the plaintiff's action must accordingly be dismissed. In the above view of the case it becomes unnecessary to consider the question of the second defendant's alleged adoption or of the forfeiture of the first defendant's right by her *Diga* marriage.

Judgment set aside, and plaintiff's action dismissed with costs.—*Sup. Court, Cir.* 1881, *pp.* 19-20.

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* See *ante pp.* 6, 7.

CHAPTER II.

ON DEEDS AND TRANSFERS.

SECTION I.

(From D'Oyly's Notes on Kandyan Law.)

1 Owner can alienate his property as he pleases.—2. Donations of land may he made orally or in writing.—3. Number of witnesses necessary to a deed.—4. Written deed is necessary to disinherit an heir at law.—5. When written deed not necessary.—6. All deeds are revocable by the grantor.—7. Grantee when entitled to recompence if deed revoked.—8. Reason necessary for disinheriting a legal heir.

Owner can alienate his property as he pleases.

1. The proprietor has full power to dispose of his whole landed or other property to his adopted son, or even to a stranger, in exclusion of his own children, but rarely does so without just cause.—*D'Oyly's Notes, p. 6.*

Donations of land may be made orally or in writing.

2. Donations of land are made either by oral declaration or by writing; and oral gifts, if clearly and satisfactorily proved, are held to be of equal validity with written ones.*—*Ibid, p. 6.*

Number of witnesses necessary to a deed.

3. Deeds are usually attested by five witnesses, and frequently by more, if the property transferred be considerable; but three at the least are deemed requisite, otherwise the deed, though not at once set aside, is held questionable, and satisfactory explanation is required why more were not called. The names of witnesses absent at the time of writing are sometimes inserted in the deed, and it is considered sufficient if it be read to them, shortly after, in presence of the parties, or of him who executes it.—*Ibid, p. 8.*

Written deed is necessary to disinherit an heir at law.

4. It has been alleged, (I understand), by some Chiefs that a written deed is absolutely necessary to entitle the adopted son or stranger, and to disinherit the legal heirs, but I conceive, from the decisions which have taken place establishing the validity of verbal gifts in favour of the wife or one of the children, that the opinion referred rather to the necessity of full and incontrovertible proof of the fact, which after lapse of time would otherwise be uncertain and difficult, than to

* See Proc. 28 Oct. 1820, repealed by Ord. 7 of 1834, which by Ord. 7 of 1840.

any virtue in the writing ; for upon minute enquiry I find it generally admitted, that such an oral donation to any one proved recently after it took place by respectable and undoubted witnesses must be held valid.—*Ibid, p.* 6.

When written deed not necessary.

5. When a man's last hour approaches, and for want of a writer the time will admit of doing no more, he sometimes writes a single letter, or makes a scratch on a blank ola, at the same time verbally declaring his will. In such case the deed may be written in his name immediately after his decease, and the names of those who were present at the transaction being subjoined as witnesses, it is held to be of equal validity.—*Ibid, p.* 8.

All deeds are revocable by the grantor.

6. Transfers, donations, or bequests of land are revocable at pleasure during the life of the proprietor who alienates it. It is held that any land proprietor who has even definitely sold his land, may redeem it at any time during his life, paying the amount which he has received, and the value of any improvement, but his heirs are excluded from this liberty. The reason of this custom is the respect and attachment which belongs to ancient family-rank and family-estate, and the importance ascribed to the preservation, as it is called, of *Name Estate—Nama Gama*, the name by which every person of rank is distinguished and generally known, being that of the village in which his name or principal estates are situated, as " Peleme Talawe Adigars," from his ancient village in Yatinuwara ; " Eyhelepola Adigar", and " Ratwatte Dissawe" from their respective villages in Matalle ; " Mollegode Adigar" from his village in the Four Korles.—*Ibid, p.* 6.

Grantee when entitled to recompense if deed revoked.

7. When a landed proprietor is become old and infirm and has no near relation, or none who look after him, it is a common practice for him to transfer his lands to another, frequently a relation, on condition of receiving support and assistance till death. In this case the latter sends one or more servants to wait upon and administer to him, and supplies provisions and medicine according to his ability, the condition of the party, and the value of the land. If the owner (for he must be called so still) be dissatisfied with the assistance afforded, he can at any time revoke the gift, as well by virtue of the rule above stated, as because it is conditional, and make over his property to another person, who thereupon reimburses the acceptor for expenses incurred. This change of possession is not unfrequent, and there have been instances of five or six successive resumptions and new assignments by the same capricious proprietor. It follows from the foregoing that the last bequest or

transfer of property supersedes all which may have preceded. All deeds excuted in the Kandyan country (except occasionally amongst strangers who have adopted foreign customs,) whether for the alienation of land or moveable property, are not properly vouchers, but mere written records of the transaction, being signed neither by the parties, the writer nor the witnesses. In other respects they are in the nature and bear the tenor of regular vouchers reciting the contracting parties, the amount and object, the condition of transfer, payment and interest, specifying the names of the witnesses, and sometimes that of the writer and date. In written conveyances of land it is customary to add, according to an ancient form, and still prevailing superstition, that judgment or curse will befall other claimants, who may disturb, but not the person entitled under this ola in the event of swearing the 5 or 7 oaths.*.—*Ibid, pp.* 7, 8.

8. The disinheritance of the legal heir, (unless remotely connected,) with the motive for it, is usually, and ought in propriety, to be specified, whether it be a written or oral will; and if the legal heir be a son or daughter or near relation, naturally dependent on the testator, omission will scarcely take place, for it is held incumbent on the intended heir and the witnesses to suggest their situation to his notice.—*Ibid, p.* 7.

Reason necessary for disinheriting a legal heir.

SECTION 2.

(From Sawer's Digest on Kandyan Law.)

1. Imprecation necessary to make a deed valid.—2. Grantor's signature not absolutely necessary to a deed.—3. Deed when valid though signed on blank.—4. All witnesses need not be present at execution.—5. Deed when valid without signature.—6. Delivery.—7. Ceremony of acceptance.—8. Age at which one may execute a deed.—9. Minor's act when valid.—10. Minor can cancel his deed.—11. Deed invalid if fraudulently executed. 12. Heir's right to cancel the same.—13. Same rules in case of females.

1. Written deeds of any kind, respecting rights to property, were not common before the reign of King *Kirtisree*.—*Saw. Dig., p.* 27.

Imprecation necessary to make a deed valid.

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* The *five* and the *seven* oaths are—1. By hot oil.—2. By paddy—3. By earthen vessels.—4. By drawing white olas.—5. By striking the earth, and casting mud and water.—6. By Ripolla or the red-hot-iron.—7. By Naya, or cobra de capella. For a detailed account of the above ceremonies, see *Le Mesurier's* transalation of the *Niti Niganduwa*, pp. xxxv—xxxix.

Deeds for the transfer, or bequest of property, has been transferred or bequeathed in parveny (perpetuity) and which have not the imprecations against the executor of the deed himself, his heirs and relations, in the event of the possessor being disturbed in the possession, were considered of inferior validity. The same imprecations were necessary to be pronounced in a verbal gift, transfer, or bequest of landed property, and the same when *Ketta* or token was given,—*Ibid, p.* 27.

Grantor's signature not absolutely necessary to a deed.

2. It never was customary for the witnesses to sign the deed, it was the general practice for the executor of the deed to make a mark by a mere scratch or by writing one letter on the leaf before it was written upon, this was commonly done before it was delivered to the writer by the person who was to execute it, but its being marked or signed by the executor was not considered essentially necessary to its validity, if it was completed and read to him before his death.—*Ibid, p.* 27.

Deed when valid though signed on blank.

3. It was common, when a writer could not be procured at the moment, for the person making the bequest or transfer to sign or mark the talpot or olah upon which the deed was ultimately to be written, a deed proved to have been so marked when blank by the disposer of the property to which it referred.—*Ibid, p.* 27.

All witnesses need not be present at execution.

4. It was not necessary that all witnesses mentioned in the deed should be present, it was only necessary that they should be informed by the executor of the deed that he had executed such a deed, or intended to execute such a deed, and that its contents expressed his will or intention declared at the time he marked the leaf, was considered a good and valid deed.—*Ibid, p.* 27.

Deed when valid without signature.

5. Even a voucher which had been written on a declaration made without a scratched leaf of any kind being given would, if it were proved that it contained the last verbal declaration of the person transferring or bequeathing the property, be held to be valid; in short, all that was necessary was to prove the will or intention of the disposer of the property.—*Ibid, p.* 28.

Delivery.

6. The customary ceremony on such occasions was for the person who was making the transfer or bequest, to deliver the talpot, olah, or Ketta, into the hands of the person in whose favour the transfer or bequest was made, who received it with reverence and respect, after which he carried it round to the bystanders, and, delivering the deed or Ketta to each of them, received it back in a congratulatory manner from each.—*Ibid, p.* 28.

Ceremony of acceptance.

7. When no deed or Ketta was given on a bequest being made, it was customary for the persons making

the bequest to take the right hand of the donee and declare the bequest in his or her favour; the strict observance of all such ceremonies gave the greater validity to the act and deed. But a deed being written in the handwriting of the person in whose favour it was drawn, was considered sufficient to invalidate the same, and this was certainly a necessary precaution, where the execution of deeds was done in so loose a manner.—*Ibid, p.* 28.

8. The age of puberty is the age of manhood and discretion, and as a young man is capable of marriage at the age of 16 years, so he is competent to contract debts, and is answerable at law for all his deeds executed and contracts entered into after the end of his sixteenth year.—*Ibid, p.* 28.

Age at which one may execute a deed.

9. A minor at the age of 10 years may will or bequeath his or her property, but to validate such a deed it must be proved that the minor was fully aware of the importance of the same, and of the consequence of the transaction, and further that there were sufficient grounds for cutting off the inheritance of the heir or heirs at law.—*Ibid, p.* 29.

Minor's act when valid.

10. Should a youth sell his lands, his cattle or his goods before the end of his sixteenth year, he can break the bargain and resume the possession of his lands, cattle or property, on refunding the value which he may have received for the same.—*Ibid, p.* 28.

Minor can cancel his deed.

11. The Chiefs are of opinion that, as by their religious books the age of wisdom is not attained until forty, that a person who had lost his land, cattle or property, by an imprudent sale or transfer in nonage, should have the privilege until he is forty of reclaiming his lands, cattle, or property so lost.—*Ibid, p.* 29.

Deed invalid if fraudulently executed.

12. The relations and heirs of a minor may interfere and prevent his selling his property, but if they do not so interfere at the moment, or so soon as it comes to their knowledge, they have no remedy afterwards; but if it was done without their knowledge, they might then have their remedy if their relative died in nonage.—*Ibid, p.* 29.

Heir's right to cancel the same.

13. The same rules apply to females, being minors.—*Ibid, p* 29.

Same rules in case of females.

SECTION 3.

(From Marshall's Judgments.)

1. The owner can dispose of his property as he pleases.—2. This power when limited.—3. The reason for disinheriting the legal heir.—4. Motive for doing so.—5. Legal heir cannot be disinherited without just cause.—6. Consent of heir necessary for disinheriting him.—7. Power of revoking.—8. Grantee entitled to compensation.—9 Unconditional donations of moveable property irrevocable.—10. Of donation the last is preferred.

The owner can dispose of his property as he pleases.

1. That, according to Kandyan Law, the owner of land or other property is not prohibited from disposing of it to any person he pleases, away from his heirs.—*Mar. Judg., p.* 323. § 47.

The consent of the heir to such disposition is not necessary to give validity to it.—*Ibid, p.* 323 § 47.

It is stated unanimously by the Chiefs who have been consulted, that a person having the absolute possession of [and right to] real or personal property has the power to dispose of such property unlimitedly; that is to say, he or she may dispose of it either by gift or bequest away from the heirs at law.—*Ibid, p.* 307. § 37.

This power when limited.

2. But to the unlimited power of disposing of landed porperty there was this exception, that lands liable to Rajakarea or any public service to the Crown or to a superior, could not be disposed of either by gift, sale or bequest, to a *Wihere* or *Dewala*, without the sanction of the King, or the superior, to whom the service was due. (1)* But some of the principal Chiefs, who have a strong bias in favour of the Church, say that though it was required to have such sanction before lands registered in the *Lekam Mettiya* and liable to service, were made offerings of to Temples, yet it was not customary to annul them when once made, and as in most instances

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* The reader cannot fail to be struck with the analogy between this restriction imposed by the Kings of Kandy, on the power of alienation to Buddhist Temples, and the English Statutes of Mortmain, by which similar transfers to religious houses were prohibited without license from the King or from the intermediate Lords by whom the lands were held; nor is the analogy confined to the respective attempts to prevent alienation. The same desire to evade the law, both on the part of the superstitious donor and on that of the religious communities, is observable in the Kandyan-land holders, and in our Anglo-Norman ancestors, in the Temples of Buddhu, and in the Cloisters of the English Convents.

it was only part of the service *Pangua* which was offered, the services for the whole *Pangua* became chargeable on the part of it which remained unoffered; if the whole was offered, without sanction, the Temple was obliged to perform the service or pay the dues.—*Ibid, pp.* 307, 308 § 37.

3. Whether the owner's reasons for so disposing of his property must necssarily be expressed seems doubtful, but as it is usual not to state the reason, whether undutiful conduct on the part of the heir, want of support or assistance, or any other ground to such omission, must always excite suspicion, and in doubtful cases must weigh very forcibly against the act of alienation, that in all cases deeds, disinheriting the heir at law, require to be strictly and jealously watched, and that if they be not satisfactorily established, the Court will lean against them in favour of the rights of the heir at law, as is the rule of the law of England and of the Civil law. Sup. Par. 190.—*Ibid, p.* 323 § 47.

The reason for disinheriting the legal heir.

" On the subject of this right of disherison the absolute exercise of which, as we shall presently see, forms almost to this day, a controverted question, the following opinions of Sir John D'Oyly are extracted from his observations: 'On deeds and transfers'—Donations of land are made either by oral declaration, or by writing; and oral gifts, if clearly and satisfactorily proved, are held to be of equal validity with written. The proprietor has full power to dispose of his whole landed or other property to his adopted son, or even to a stranger, in exclusion of his own children, but rarely does so, without just cause. It has been alleged, I understand by some Chiefs, that a written deed is absolutely necessary to give a title to the adopted son or stranger, and to disinherit the legal heirs. But I conceive from the decisions which have taken place, establishing the validity of verbal gifts in favour of the wife or one of the children, that this opinion rather referred to the necessity of full and incontrovertible proof of the fact, which after lapse of time would otherwise be uncertain and difficult, than to any virtue in the writing. I find it generally admitted that such an oral donation to any one, proved recently after it took place, by respectable and undoubted witnesses, must be held valid.—*Ibid, p.* 308 § 37.

" The disherison of the legal heir [unless only remotely connected] with the motive for such disherison, is usually, and ought, in propriety, to be specified, whether it be a written or oral will; and if the legal

heir be a son or daughter, or near relation, naturally dependent on the testator, the omission will scarcely take place, for it is held incumbent on the intended heirs and the witnesses to suggest their situation to his notice." It is to be observed here, that Sir John D'Oyly does not go the length of saying that the motive of disherison must absolutely be mentioned, and that the act of disherison will be void, unless the motive be specified, but only that it ought to be, and usually is, mentioned; the omission, therefore, though it would naturally excite suspision, and in a doubtful case would raise a presumption against the act of disherison, would not, and ought not to, be necessarily conclusive agaiDist the disherison, supposing the act to be satisfactorily established by other evidence. See the cases on this subject in following Par. 38 to 44.—*Ibid, pp.* 308, 309.

The principle laid down both by Sir John D'Oyly and by Mr. Sawers in the preceding Par., that the owner of landed property may dispose it away from the heirs, though certainly supported by the majority of the decisions on this subject [See No. 6,347, Kornegalle, 14 December, and 416, Kornegalle 23rd November, 1833, where the S. C. expresses itself of that opinion] would not appear to have been universally recognised by the Kandyan authorities, many of whom have held that the heir cannot be disinherited, unless for some good cause, which must be expressed in the deed itself; nay, some have insisted that the consent of the heir to his own disherison is necessary, and must even appear in the deed by which such disherison is effected. The following case will shew the opinions entertained on this subject by many persons of great experience in Kandyan customs, while it demonstrates the impossibility of obtaining unanimous expositions of unwritten laws, resting only on tradition, as their authority, and on custom for their enforcement.—*Ibid, p.* 309 § 38.

A plaintiff claimed a field by right of inheritance from his father *Walgame Mudianse.* The defendant's answer, as far as necessary to make the points intelligible, was that the *Mudianse* had allotted half the field to his son, the plaintiff, and the other half to one *Meddumaralle* who died, but that afterwards, being displeased with the widow of *Meddumarale* he transferred the whole by deed to the defendant, with the sanction of the plaintiff himself; that he the defendant had retained possession of the field ever since and had rendered assistance to the *Mudianse,* in fulfilment of the conditions of the transfer, for one year, when the *Mudianse,* removed to the house of the mother of *Meddumaralle's* widow,

where he died two or three days afterwards, and that his death took place ten years ago. The deed produced by the defendant was dated $\frac{1737*}{1815}$ and purported to be an account of the *Mudianse* having incurred debts which the defendant was to take upon himself for assistance which the defendant was to render; and of the Mudianse's eldest son being consigned to the protection of the defendant. The Court of Judicial Commissioners considered it unnecessary to go into evidence, the deed appearing invalid.

1st, because it contained no mention of the plaintiff's consent, as alleged by the defendant, and without which consent so expressed, the plaintiff could not in the opinion of the Court be disinherited.

2ndly, because the defendant had made no allusion in his answer to the payment of debts, as stipulated in the deed. The Court accordingly gave judgment for the plaintiff as heir at law, reserving the right of the defendant to recover back any expenses which he might have incurred. The defendant appealed to the Governor [this was before the promulgation of the new Charter], by whom the case was referred back for reconsideration; on the grounds, 1st, that the assent of the son was not necessary; 2ndly, that the father had not divested himself, by the first allotment, of the power of otherwise disposing of the property; and 3rdly, that the defendant's omission to mention the debts in his answer amounted only to a suspicion against the deed, but was not sufficient of itself to annul it. The case having been reconsidered, the Assessors delivered the following opinions: "If a son prove undutiful, the father may give his land to a third person, in consideration of assistance, but, in such case, the deed must specify the causes of disherison. If a son be unable to render assistance to his father, the gift to another person must be by his consent. The present deed is not a remuneration for assistance given or debts paid, but a stipulation for assistance to be given and debts to be paid: and evidence is unnecessary because the donor quitted the defendant's house before his death, which, of itself, is sufficient to vitiate the deed of gift [see No. 3,660. Kornegalle, infra par. 44 as to this point], and therefore the defendant could only claim to be paid for his

* *Sacca* 1737 was equal to the Christian era 1815.—The way to find this out is, by adding 78 to *Sacca*, which will always give the Christian era.

expenses. The members of the Court concurred in this view of the case, and in that state, the proceedings were brought up to the S. C., upon which had then devolved appellate jurisdiction all over the Island. The following order was there made: That the case be referred back to the D. C. to hear evidence on the following points: 1st whether the plaintiff's consent to the deed of gift was expressed by him or not; 2ndly, how long the defendant supported the plaintiff's father and when the latter left the defendant's house; 3rdly, whether the defendant paid any debts for the plaintiff's father and to what amount; and 4thly, when the plaintiff's father died, and how long the defendant had been in possession. The S. C. then observed, "that it could not but be somewhat startled at the proposition, so broadly laid down, that the consent of the son was absolutely necessary to enable his father to dispose of his property (1)*, even though the son and heir should be so poor [according to the second opinion of the Assessors] as to be unable to render the required assistance, that if this were correct, the father might perish, because his son refused to sanction his parting with his property to enable him to procure support, a position which was not only unreasonable in itself, but was also [if pushed to the extreme extent insisted upon by the Assessors] at variance with the general rules of Kandyan Law, as far as the S. C. had been enabled to ascertain those rules, and which would seem to be contradicted by many of the numerous decisions of the Courts in the Kandy Districts, confirmed too by the Court of the Judicial Commissioner, which were then lying before the Judges of the S. C. for revision [See No. 3010 and 5323 Kornegalle, infra par. 39], that the judgment of the Court below, however, went still further, and decided that the consent of the heir, openly and expressly avowed, was not sufficient to legalize a deed of transfer unles such consent appeared in the deed itself; in other words, unless the heir were a party to the deed—that no law or custom, however venerable by age, could sanction fraud, whereas, if the defendant's statement were true, the plaintiff's conduct had been fraudulent in the highest degree, since, if he did express his assent to the transfer which he now disputed, such assent must be presumed to

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* (1) It may be observed, as matter of analogy, that by the Common Law of England, a man could not give by will away from the heirs at law without the heirs' consent, till the 32. Hen. 8. ch. 1. enabled him so to do.

have contributed to induce the defendant to afford that support and assistance to the plaintiff's father, which without such assent he would probably have refused, but that even if the deed should, on further evidence, turn out to be invalid, as an absolute transfer, it must at least be considered that the defendant had a virtual mortgage on the land for any expense which he might actually have been put to, for the father's support or for the payment of his debts, and therefore that he had a right to hold it as a security for repayment. That in case of the deed being ultimately rejected, therefore, the defendant, instead of being turned out of the land and then left to his remedy at law, should be first repaid his expenses, and then be decreed to give up possession." On the proceedings being again returned to the S. C., it appeared by the evidence that the deed had been given for the considerations assigned by the defendant, that the condition had been fairly fulfilled, and that the defendant had been many years in possession, and judgment was accordingly finally decreed for the defendant. No. 4380. Kandy, 9th October, 1833, and 24th May, 1834. —*Ibid*, *pp*. 309–312.

Legal heir when cannot be disinherited without just cause.

5. There can be no doubt, however, that every transfer of property, by which the heirs of the Donor or Testator are to be disinherited, should be vigilantly watched and strict proof required of any Deed, by which such transfer deviating from the usual course of natural feeling and affection is to be effected. In the case just mentioned No. 5323 Kornegalle, the S. C. decided against the validity of the deed, on the ground of certain discrepancies and contradictions in the evidence, which were entitled to the greater weight, from the consideration that the effect of the instrument was to disinherit the son, and heir at law: And where such transfers purport to be in consideration of assistance it is equally incumbent on the Courts, to see that the conditions have been faithfully and strictly performed. The following cases will shew the view taken by the S. C., on this subject, when first it was called on to decide on the Kandyan law of inheritance. An action was brought for certain Lands claimed by the plaintiff, as having been granted to him by his uncle *Kieralle* in consideration of assistance which the plaintiff rendered to his uncle for six months until his death. The deed was disputed by the widow of the deceased on behalf of herself and her child, and she averred that, though the plaintiff had persuaded *Kieralle* in his illness to leave his own house and go and reside with the plaintiff, she had succeeded in bringing

him back to his home where he died. The plaintiff proved that he had rendered assistance to his uncle, and also called several witnesses to prove the execution of the deed, but not the writer of it. The assessors now were of opinion, that as the plaintiff had proved the deed and assistance, he was entitled to judgment, and the Judicial Agent being of the same opinion, a decree was passed in his favour accordingly. On appeal to Kandy, the assessors in that Court were of opinion that the decree should be affirmed: the Judicial Commissioner, that it should be reversed, partly because plaintiff's deed asserted that *Kieralle* had no children, partly because the plaintiff's services did not entitle him to a grant by which the heir at law was disinherited. In consequence of the difference of opinion, the case was referred to the S. C., where the following order was made. "That the D. C. should take the evidence of the alleged writer of the plaintiff's deed, and enquire why he was not called as a witness." That the S. C. did not go so far as the late Judicial Commissioner, in thinking that the plaintiff's service, if really rendered, would not have warranted the grant in his favour; nor was it quite correct that the deed alleged *Kieralle* to have no children, for it only declared that he had neither wife nor children, *to assist him in his illness*, that every deed, however, disinheriting the heir at law ought to be proved beyond the possibility of doubt or suspicion. That the not calling the witness of such deed, without accounting for the omission, by death, or other uncontrollable circumstances, had, in itself, a suspicious appearance, more especially considering that the names of witnesses were often not signed by themselves, but simply introduced into the body of the instrument, with their assent". [vide supra : III. 2. 3.] The omission to call the writer in the first instance having been afterwards satisfactorily accounted for, the original decree in favour of the plaintiff was affirmed. No. 8736. Kornegalle 20th November 6th December 1833.—*Ibid. pp.* 313-315. § 40.

In another case in the same Court, the plaintiff claimed as heir at law, the defendant claimed by virtue of a deed, by which the plaintiff would have been disinherited, as regarded the land in dispute. The evidence as to the facts, and as the proof of the defendant's deed was conflicting, the assessors considered the plaintiff had not established his right, the Judicial Agent was of a contrary opinion, and that no credit was to be given to the deed of the defendant, on appeal to Kandy, the assessors there agreed with the Judicial Agent, and

observed moreover that even if the deed had been completely proved, it would have been of no validity, because it assigned no reason for disinheriting the heir. The Judicial Commissioner again differed from his assessors, and considered that the deed might be maintained. The S. C, on the case being brought before it, decreed that the plaintiff be put in possession of the land claimed, according to the opinion of the late Judicial Agent of Kornegalle, and of the assessors of Kandy, without going so far with the assessors as to say that the deed of disherison, filed by the defendant, was necessarily invalid, because no reason was assigned for that act, still the absence of any such reason was one argument against its being genuine, and must necessarily be entitled to weight in a doubtful case. No. 7165, Kornegalle, 21st November 1833.—*Ibid. p.* 315. § 41.

Consent of heir when necessary for disinheriting him.

6. Two cases have just been referred to, in par: 38, as being at variance with the decision of the court of Kandy, as regards the necessity of the heir's assent to the property being disposed of to his prejudice. In one of them the claim was for four fields which had been sold to him by one *Menickrale* whose wife had neglected him, and who, by that sale, deprived his wife and child of the right of succession. The case was inquired into with great care by the Court of the Judicial Agent which gave judgment for the defendant on the strength of the deeds, which were satisfactorily proved, and of long possession. This judgment was confirmed by the Court of the Judicial Commissioner at Kandy, but there certainly was no proof of any assent on the part of the respective heirs in that case. And though the length of possession by the defendant may be supposed to have strengthened his case, yet it must be recollected that in No. 4,380 from Kandy, par: 38, one of the points urged by the defendant in his answer, was possession, for upwards of ten years, which he afterwards established by proof. The S. C. affirmed the decisions of the Court below. No. 3010 Kornegalle, 9th October 1833. In the other case, also, the question was whether a deed of gift, under which the defendant claimed and by which the plaintiff, the son and heir of the donor, was disinherited, had been satisfactorily proved. The Court of the Judicial Agent was of opinion, that it had not, and accordingly decreed for the plaintiff. The Court of the Judicial Commissioner, on appeal, was of a contrary opinion, and gave judgment, for the defendant. In this case again no consent on the part of the plaintiff, as son and heir, was proved, or even asserted. The S. C., how-

ever, on the case coming before it, agreed with the original Court, that the Deed was not satisfactorily proved, and on that ground decreed that the plaintiff should be put in possession of the land in question. No. 5323. Kornegalle 8th October 1833.—*Ibid, pp.* 312-313 § 39.

Power of revoking.

7. In all transfers for assistance to be rendered, the condition must be shewn to have been faithfully and strictly performed, in failure of which the transfer ought not to be enforced.

The donor has the right of revocation by any subsequent transfer; and even without deed, for the act of his removing to another house, where the transfer was in consideration of assistance, would seem to amount to a revocation; that where his intention is not clearly expressed as to revocation and other disposition, the Court must decide according to the evidence, whether just ground existed for his dissatisfaction with the first Donee.

And that where the subsequent transfer is confirmed, or the former one is revocable, the question arises as to the claim of the former Donee for remuneration for assistance actually rendered by him.—*Ibid. p.* 323 § 47.

In another action, also in the Court of Seven Korles, the plaintiff claimed certain land by virtue of a deed of gift from one *Horetella*, in consideration of assistance to be rendered to that person, and of paying his debts. At *Horetella's* death his claim was set up by the plaintiff and was opposed by the defendant, on behalf of one of *Horetella's* daughters, by virtue of a deed alleged to have been executed in her favour by him a few days before his death. The evidence was of that description, unfortunately but too common in Ceylon, which makes it difficult to say on which side fraud and perjury lie, or whether both parties be not open to the imputation. The nature of the evidence will, however, appear sufficiently to make the decision intelligible from the respective judgments. The Assessors in the Court of the Seven Korles were of opinion that, though the plaintiff had proved the execution of the deed in his favour, yet there was much prevarication in his witnesses, and as it by no means appeared that he had fulfilled his agreement as to assistance, but rather the contrary, they did not consider he had established his claim to the land, which they, therefore, were of opinion should be divided between the two daughters of *Horetella*, for one of whom the defendant claimed. The Judicial Agent concurred in this view of the case, and it was decreed accordingly. On appeal to the S. C. this decree was affirmed in the following terms: "This Court is not surprised at the im-

pression made in the Court below, by the extraordinary manner in which the witnesses swear in this case. But the ground on which the case has been decided renders the question of fraud or prevarication of little importance. With that ground, this Court fully concurs The deed in favour of the plaintiff was granted on a specific condition, not *executed* but *executory*. There can be no doubt, therefore, that a failure in the performance of that condition, must defeat the instrument, it was for the plaintiff to shew a real *bona fide* performance of that condition. In this, he has certainly failed. It appears indeed that the deceased lived for a time in a house, either belonging to the plaintiff, or over which he exercised a certain degree of control; and that the plaintiff supplied him for a time with rice, but there was no one on the part of the plaintiff to render that personal assistance and attendance to the deceased which evidently was in his contemplation when he executed the deed, and which the plaintiff's own witnesses state was rendered to *Horetella* by his daughter. It is also a strong circumstance, that the last offices were rendered to *Horetella*, not by the plaintiff but by the defendant. It is indeed said by the plaintiff's first witness that the deceased was removed from the plaintiff's house by the defendant, but not of his own free will. If, however, the plaintiff had been executing the stipulated condition, according to the spirit of it, he would have been present and might have prevented any violence being offered, if any such were really offered, to the inclination of the deceased. Nor has the plaintiff proved the payment of any debt for *Horetella*, except in a manner much too loose to entitle the evidence on that point to any weight. Indeed, the circumstance of the plaintiff having requested the creditors to wait for payment would rather lead to a contrary inference. It is of great importance that the strict fulfilment of those conditions which appear so frequently to form the consideration for grants of lands in these Districts should be watched with zealous vigilance, in order to prevent designing persons from availing themselves of the weakness of the aged or infirm persons to get possession of their little property, in prejudice of the rightful heirs, and then leaving them to perish in a state of destitution." No. 1,622. Kornegalle, 26th October 1833.—*Ibid. pp.* 315-317. § 42.

An action was brought on Notarial deed dated 19th June 1829 for land thereby assigned to the plaintiff by the defendant in consideration of assistance already afforded and to be rendered to the defendant as long as

he lived, or, in default of recovering the lands, the plaintiff claimed pecuniary compensation for the assistance rendered by him to the defendant and his wife for the last seven years. The defendant admitted the deed, but alleged that the plaintiff had failed to render the stipulated assistance, whereupon the defendant had assigned the land, by another deed, to his grand-daughter. The Court of Matelle considered it unnecessary to hear the evidence, because, the deed being admitted, it was clear that the land was the property of the plaintiff, and it was so decreed accordingly, provided the plaintiff continue to render proper assistance. On appeal to the Judicial Commissioners' Court it was observed by that Court "That according to Kandyan law, a donor did not lose the right of transferring his land to a second donee, if he had cause to be dissatisfied with the assistance of the first," and the case was therefore referred back to Matelle for evidence as to the assistance actually rendered. On the part of the plaintiff, the witnesses stated that the defendant transferred his land to the plaintiff, giving one of his teeth as a token; that the plaintiff had provided everything necessary for six years, cultivating the land and giving the produce to the defendant, who, however, assigned the land to his grand-daughter about a year before the action brought, and that the plaintiff came to the defendant and offered to render assistance after the first decision at Matelle, which the defendant, however, rejected. The defendant's witnesses stated that the plaintiff assisted the defendant, before the execution of the deed, but not since. On this evidence the Court of the Judicial Agent was still of opinion that the plaintiff was entitled to judgment. The case being again carried in appeal to Kandy, the Assessors who gave credit to the defendant's witnesses were of opinion, "That as the deed had been granted for further, as well as past, assistance, and as the plaintiff had not rendered any assistance since the deed was passed the grant was forfeited, but the plaintiff was entitled to compensation for his former assistance." The Judicial Commissioner agreed with his Assessors, except as to the latter part of their opinion, for he considered, that as the plaintiff had forfeited the deed through neglect, he was not entitled to any compensation; the case being brought before the S. C. the view taken by the Judical Commissioner was confirmed, and it was decreed as to the Deed granted to the plaintiff by the defendant. "It is necessary," the S. C. observed, "that these alienations of land out of the family of the donor, in consideration of assistance, should be

strictly watched, with respect to the due performance of the condition. In the present instance, it appears that the plaintiff began to relax in his attentions and assistance, from the time the deed was executed. These instruments, it seems, are always revocable by the Kandyan law [vide infra. Par. 46] subject in certain cases to compensation for assistance actually rendered. Now, the plaintiff cultivated the defendant's land for six years, and though it is said he gave the produce to the defendant, it is not to be supposed that this did not go towards the defendant's support. If these deeds were to be enforced in the terms of the decree in the original Court, that is, provided he continues to render proper assistance to the defendant, this latter person would be entirely at his mercy, or which is nearly as bad, he would be obliged to have recourse to law in every instance in which the plaintiff failed to render him adequate support." *D. Meck Appoo vs. Attoohendua,* Matelle 26th November 1833.—*Ibid. pp,* 317-319 § 43.

In another case, closely resembling the foregoing, and which was decided on similar grounds, the plaintiff claimed a garden as having been transferred to him by the defendant's wife on deed in consideration of assistance to her. The defendant proved that the plaintiff had discontinued his assistance for some time before his wife's death, and that the defendant had been obliged, in consequence, to borrow paddy for his wife's support. The Court of Kornegalle, accordingly, decreed for the defendant, and this decree was affirmed by the Judicial Commissioner's Court, and afterwards by the S. C. No. 3,660 Kornegalle, 10th October 1833. In this case, however, some of the Kandyan Assessors were of opinion that, as the deed of transfer had been duly executed, and as the plaintiff had assisted the defendant's wife till a few days before her death, he was entitled to retain the garden.—This opinion is mentioned here as being at variance with that expressed by the Assessors' also Kandyans, in No. 4,380 sup. par. 38 from whom he was to receive assistance, two or three days before his death was a revocation of the grant, even though he left the house, of his own accord, and without any failure of assistance, as far as appeared.—*Ibid, p.* 319 § 44.

The power of revoking or superseding the Gifts or bequests by other subsequent ones is so intimately connected with the original power of disposition, that it will be convenient to insert in this place what is said by Sir John D'Oyley and Mr. Sawers respectively on this subject; To begin then with Sir John D'Oyley; Transfers,

the Donations* or bequest of land are revocable at pleasure during the life of the proprietor who alienates it: It is held that any land proprietor, who has even difinitely *sold* his land, may resume it, at any time during his life [this position we shall presently see, is disputed by the chiefs consulted by Mr. Sawers] "paying the amount which he received, and the value of any improvement, but his heir is excluded from this liberty. The reason of this custom is, respect and attachment, which belong to ancient family rank, and the importance ascribed to the preservation, as it is called, of name and village; the name by which every person of rank is distinguished and generally known, being that of the village, in which his ancient or principal estates are situated. When a land proprietor is become old and infirm, and has no near relations, or none who look after him, it is a common practice for him to transfer his lands to another, frequently

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* (Note by Justice Thomson.) A donation in consideration of assistance to be rendered to the donor, is, by the Kandyan law, revocable, subject in certain cases to compensation for assistance actually rendered. *(Dodandenia v. Koomara. Gov: Ag: Matelle, Morg: D. p. 7.)*

Kandyan deeds of gifts, excepting those made to priests, whether conditional or unconditional, are (like wills) always revocable by the donor in his lifetime, and are often made in contemplation of death; but such presents differ essentially from last wills or documents in respect to their transferring an immediate title or interest to the donee in the property thereby granted; whereas a will does not take effect until the death of the testator. Until proof of both side has been gone into as to the execution of these grants, and it be shown whether they were delivered or not to the donee, and whether the donees were put into immediate possession of the lease granted thereby, this Court cannot, in the present stage of the suit, give any *opinion* as to what is the legal effect of the deeds.

(4271. *D.C. Matelle, 20 Aug:* 1844.) The consideration on condition of the deed of gift is "to render all an every necessary assistance till my death, to cause my remains to be buried according to the customs of the country." Now the custom on such gifts is for the donee to send one or more servants to wait upon the donor, and to supply provisions and medicines, and procure the burial according to his ability the condition of the party, and the value of the land.

(See Marshall, Dig : p. 321, par 46) : and such services not being required to be rendered personally by the donee himself, his heirs, although not named in the deed, take by law, on his death, an interest in the condition, and may perform it. Whether the services have been continued to be duly rendered to, and accepted by, the donor during his lifetime, or whether he ever expressly revoked the deed of gift and assumed possession of the lands given, are questions for evidence upon such points being raised in defence by the answer. *(12121 D.C. Kornegalle, 11th June 1851, Coll.)*

a relation, on condition of receiving support and assistance till death. In this case the latter sends one or more servants to wait upon and administer to him, and supplies provisions and medicines, according to his ability, the condition of the party and the value of the land; If the owner, for so he must still be called, be dissatisfied with the assistance afforded, he can at any time revoke the gift as well by virtue of the rule above stated as because it is conditional, [the latter ground, viz: the conditional nature of the true foundation of the power of revocation"] and may make over his property to another person who thereupon reimburses the first acceptor for the expenses incurred by him. This change of possession is not unfrequent, and there have been instances of five or six successive resumptions and new assignments by the same capricious proprietor. It follows that the last bequest or transfer supersedes all which may have preceded." Upon this exposition of Sir John D'Oyley of the very important question of the power of revocation, we find the following notes by Mr. Sawers who appears to have consulted Assessors on the point, and who modifies the proposition laid down by Sir John D'Oyley, as regards absolute sales of land:—a modification which good sense and Justice must lead every one to concur in. The Assessors unanimously assent to the position that Transfers, Donations, or bequests of land are revocable at pleasure during the life time of the person who alienates the same, but deny that a definite *sale* of land is revocable by the seller at his pleasure: For though it was not without precedent for bargains of this land to be broken and annulled, even years after the sale it was neither justified by law or custom.—*Ibid pp.* 320-321 § 46.*

8. On a claim of land transferred in consideration of assistance, it appeared that the deed of transfer was invalid, under Proclamation of 28th October 1820, from its bearing no mark, as the signature of a witness, but that the grantor had lived in the house of the grantee, and had been supported by him for three years, though she afterwards removed to the house of the defendant with whom she resided for eight months till her death, and to whom she made over the land in question a few days before she died. Under these circumstances the Kandyan Assessors were of opinion, that the plaintiff, though the deed could not be supported, was entitled to

Grantee entitled to compensation.

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* See also *Thom. Inst. Vol. II pp.* 623, 624.

compensation for the assistance rendered by him, and in this opinion the S. C. concurred, decreeing the land to the Defendant, he indemnifying the plaintiff according to the Assessment made of his claim by the Assessors *P. R. Ralle* and *Y. B. P Mohandiram*. Matelle 17th January 1834 on circuit.—*Ibid. p.* 320 § 45.

Unconditional donations of moveable property irrevocable.

9. Unconditional donations of moveable property, such as cattle, goods or money, were not revocable. For it was exceedingly common for old persons, having no children (1)* to take up their residence in their old age with relations or strangers, in whose favour they in the first intstance executed a deed of gift or bequest, transferring the whole of the Donor's property to the Donor, for the sake of assistance and support; but it frequently happened that the Donor was a person of capricious mind or violent temper, and upon any slight occasion would remove to another House and execute a similar deed; and thus numerous claims to his property after his death would be made upon deeds of the same import and of apparently equal validity; in such case the Judge always decided in favor of the person under whose care the deceased had died; however short the period might have been of his residence at that house; but any other person who had rendered the deceased assistance and support for any length of time and had been put to expence thereby would have a right to compensation out of the deceased's property; and even before the death of the person assisted, such compensation would be demanded and recovered.—*Ibid pp.* 321-322 § 46 †

Of' donations the last is preferred.

10. The person rendering the last assistance and support to the deceased would have a preferable right to his property to that of a person holding a deed of bequest, whose house he had quitted or whose service he had rejected, from dissatisfaction with treatment he had received, but it must be clearly proved that it was the

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* And in many instances, as the cases shew, where they had children, but who are unable and unwilling to give the requisite assistance. It would appear from the Text that what is here laid down as the opinion of the Assessors, on the subject of the revocation of Deeds for Assistance, had reference to Moveable property only; but it can scarcely have been intended to be so limited and the numerous Cases on this subject would sufficiently prove that landed property constantly forms the subject of these Conditional gift or bequests.—This and sundry other passages in the Memoranda of Mr. Sawers have suggested a fear that the copies of those Memoranda are not always correct.

† See *Thom. Inst. Vol II pp.* 624, 625.

intention of the deceased that the person rendering him assistance in his last moment was to be his heir; otherwise, the person rendering the last duties would only be entitled to be rewarded for his or her services out of the deceased's property while the bulk of the property would go to the heirs at law. And even in the case of deceased having died out of the immediate care of a person in whose house he had lived, or from whom he had received assistance and support, even to a period near that of his death, provided his so dying not under the care of this person was accidental and not by his having voluntarily rejected his assistance and support, such Benefactor would still come in for the property before the heir at law; liable, however, to the person under whose care the deceased ultimately died, for his or her trouble or expence.—*Ibid, pp.* 322-323 § 46.*

Section 4.

(From Thomson's Institutes.)

1. Written Deeds were not common till reign of *Kirtisri*.—2. Imprecation necessary to make Deed valid.—3. Nature of Kandyan Deeds.—4. Number of witnesses necessary to make a Kandyan Deed valid.—5. Grantor's signature not absolutely necessary; verbal declaration sufficient.—6. Ceremony connected with the delivery and acceptance.—7. Ceremony of licking the hand.—8. All the witnesses to the Deed need not have been present at the execution.

1. The forms of deed, and to the ceremonies to be observed in unwritten transfer and bequests of property under Kandyan Law.—*Thom. Inst. Vol II. p.* 660 †

Written Deeds were not common till reign of *Kirtisri.*

Written deeds of any kind, accepting rights to property, were not common before the reign of the King *Kirtisri* ‡

Imprication necessary to make Deed valid.

2. Deeds for the transfer or bequest of property in parveny (perpetuity) were considered of inferior validity if they had not the *imprecation*; by which, according to an ancient form and still prevailing superstition, a judgment or curse is invoked against the person executing the deed, his heirs and relations, and also against all other claimants who may disturb the person in whose

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* See *Thom. Inst. Vol. II pp.* 625, 626.
† *See Mar. Judg. p.* 354 § 131.
‡ *See Mar. Judg. p.* 355 § 132.

favour the deed is executed. The same imprecation was necessary to be pronounced on a verbal gift, transfer, or bequest of landed property; and the same when a *ketta* or token was given —*Ibid, pp.* 660-661.*

Nature of Kandyan Deeds.

3. All deeds executed in the Kandyan country [except occasionally among strangers who have adopted foreign customs], whether for the alienation of land or moveable property, are not properly vouchers, but mere written records of the transaction; being neither signed by the parties, the writer, nor the witnesses. In other respects they are in the nature, and bear the tenor, of regular vouchers, reciting the contracting parties, the amount and object, the condition of transfer, and other circumstances, and specifying the name of the witnesses, and sometimes that of the writer and the date.—*Ibid. p.* 661.†

Number of witnesses necessary to make a Kandyan Deed valid.

4. Deeds were usually *attested* [which we shall see did not necessarily include *signed*] by five witnesses, and frequently by more, if the property transferred be considerable; but three at the least, are deemed requisite; otherwise the deed, though not at once set aside, is held questionable, and satisfactory explanation is required why more were not called. It is scarcely necessary to observe that the law is altered as regards deeds of lands passed subsequently to 1st July, 1835, by Ordinance No. 7 of 1834.—*Ibid, pp.* 661-662. ‡

Grantor's signature not absolutely necessary; verbal declaration sufficient.

5. As regards the execution of deeds, it never was customary for the witnesses to sign the deed: it was the general practice for the party executing it to make a mark by a mere scratch, or by writing one letter on the leaf before it was written upon. This was commonly done before the leaf was delivered to the writer by the person who was to execute the deed. But its being marked or signed by him was not considered essentially necessary to its validity, if it was completed and read over to him before his death; or if it were proved that it contained the last verbal declaration of the person transferring or bequeathing the property, such instrument would be held to be valid. In short, all that was necessary was to prove the will or intention of the disposer of the property. It was common, when a writer could not be procured at the moment, for the person making the bequest or transfer to sign or mark the *talpot* or *olah* upon which the deed was ultimately to be written.

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* See *Mar. Judg. p.* 355 § 132.
† See *Mar. Judg. p.* 355 § 133.
‡ See *Mar. Judg. p.* 355 § 134.

When a man's last hour approaches, and, for want of a writer, the time will admit of doing no more, the dying man sometimes writes a single letter, or makes a scratch on a blank *olah*, at the same time verbally declaring his will. In such case the deed may be written in his name immediately after his decease, and, the names of those who were present at the transaction being subjoined as witnesses, it is held of equal validity.—*Ibid. pp.* 662-663.*

6. The customary ceremony on such occasions was for the person making the transfer or bequest to deliver the *talpot*, *olah*, or *ketta* into the hands of the person in whose favor the bequest or transfer was made, who received it with reverence and respect; after which he carried it round to the bystanders, and delivering the deed to each of them, received it back from each in a congratulatory manner.

Ceremony connected with the delivery and acceptance.

It was considered sufficient to invalidate a deed, that it was in the handwriting of the person in whose favour it was drawn; and this was certainly a necessary precaution where deeds were executed in so loose a manner.—*Ibid. p.*663 †

7. When no deed or *ketta* was given, on a bequest being made, it was customary for the person making the bequest to lick the right hand of the donor, and deliver the bequest in his or her favour. The strict observance of all such ceremonies gave the greater validity to the act and deed. In one case the donor of land gave one of his teeth to the donee as a token of his intention.—*Ibid. p.* 6 4 ‡

Ceremony of licking the hand.

8. It was not necessary that all the witnesses mentioned in the deed should be present; it was only necessary that they should have been informed by the person executing the deed, that he had executed, or intended to execute, such a deed, and that its contents expressed his will or intention, declared at the time he marked the leaf. The names of witnesses absent at the time of writing are sometimes inserted in the deed; and it is considered sufficient, *provided* the deed be read to them shortly afterwards, in the presence of the parties, or of him who executes it. It is impossible that the insertion of the names of persons not present at the execution can give any validity to the deed. Nor is this position inconsistent with the above; for the reading over the deed to the witnesses in the presence of the parties, or of the

All the witnesses to the Deed need not have been present at the execution.

* See *Mar. Jndg. p.* 356 § 135.
† See *Mar. Judg. p.* 356 § 137.
‡ See Mar. *Judg p.* 357 § 139.

person executing it, is in fact tantamount to a fresh execution and delivering of the deed, though it would, no doubt, be better and more satisfactory that each witness should sign the instrument, in order to leave less possibility of doubt as to the identity of it.—*Ibid. pp.* 653-654.*

SECTION 5.

(*From Solomon's Manual.*)

1. Who may execute a Deed.—2. Age at which a youth can execute a Deed.—3. Requisites of a valid Deed.—4. What is sufficient to make a Deed valid.—5. Nature of Deeds.—6. Ways in which a Deed becomes revocable.—7. Donee when entitled to recompense.—8. Donee when not entitled to recompense.—9. What Deeds are irrevocable.

Who may execute a Deed.

1. A deed may be executed by any person possessing property, provided he was of sound mind at the time of its execution. A man may transfer his landed property by deed to any person, and in any manner he chooses.—*Sol. Man. p.* 23. †

Age at which a youth can execute a Deed.

2. A youth, though his age does not exceed ten years, is competent to execute a deed, if he is sane at the time, and understands the nature of the transaction. Such a deed would be valid, even though it prejudiced his next of kin and was in favour of a stranger, but the donor must have good reasons for so disposing of his property.—*Ibid p.* 23 ‡

Requisites of a valid Deed.

3. A deed must be fully written out before it is signed; if the donor or vendor and his witnesses set their names to a blank sheet of paper which was afterwards filled up, such a document would be invalid at law.—*Ibid p.* 24. §

What is sufficient to make a Deed valid.

4. In a deed of gift or final transfer, it is not essential that the parties be mentioned by their exact or correct names so long as the description is sufficient for the purposes of identification. Nor is it necessary that with such a transfer, the original title deeds should be delivered to the purchaser The delivery of a deed of gift or final transfer to the donee or purchaser is not essential to its validity. Such a transfer would be valid, if the

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* See *Mar. Judg. p.* 357 § 135.

† See *Perera's Armour, pp.* 93, 94. But see Ord. Nos. 21 of 1844 and 7 of 1865.

‡ *Perera's Armour, p.* 94. | § *Perera's Armour, p.* 97.

deed was left in the custody of a third person, provided the donee or vendee was put in possession of the property during the lifetime of the vendor or donor, and performed the conditions stipulated in the deed.—*Ibid. p.* 24.*

5. All Deeds under the Kandyan Law, whether conditional or unconditional, are either *revocable* by the donor or *irrevocable.*—*Ibid. p.* 15. † Nature of Deeds.

6. Deeds become revocable in several ways ‡ — Modes of revocation.

(*a*) By a subsequent deed which expressly revokes the former gift.—*Ibid. p.* 25.

(*b*) By the failure on the part of the donee to fulfil the conditions of the gift.—*Ibid. p.* 25.

(*c*) By the donor resuming possession of the land gifted in consequence of neglect or ill-usage on the part of the donee and refusing further assistance from him.—*Ibid. p.* 25.

(*d*) By the donor quitting the lands and living with others who help him till his death, in consequence of the donee's ill-treatment. —*Ibid. p.* 25.

7. When deeds are revoked, the donee is, as a general rule, entitled to all the expenses which the acceptance of the gift might have cost him.—*Ibid. p.* 25. § Donee when entitled to recompense.

8. But if the donee failed to pay the debts of the donor, or to render him support and maintenance, such deeds may be revoked and the donor would not be liable to pay the donee the value of the improvements he might have made.—*Ibid p.* 25. ||

9. The irrevocable Deeds are ¶ — What Deeds are irrevocable.

(*a*) Deeds in favour of (Buddhist) priests and temples or a definite sale of land.—*Ibid. p.* 25.

(*b*) Deeds of gift which contain the condition that the donee should pay all donor's debts or should render him assistance, if the condition precedent is fulfilled.—*Ibid. p.* 25.

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* See *Perera's Armour, p.* 97. But see decisions of the Sup. Court, Nov. 26, 1834 ; Sept. 7, 1836 ; and *Observer*, April 6, 1871

† *Austin, p.* 207. No. 28628.

‡ *Perera's Armour, pp.* 91, 92 ; *Saw. Dig. p.* 19.

§ *Perera's Armour, p.* 90.

|| *Perera's Armour, p.* 92.

¶ *Perera's Armour, p.* 95.

(*c*) Deeds and transfers of land to a public functionary in lieu of a reward that was actually due.—*Ibid p.* 25.

(*d*) Deeds to any person in return for favor and assistance already rendered.—*Ibid.p* 25.

(*e*) Deed to a first wife and her children by a husband before he contracts a second marriage.—*Ibid. p.* 25.

Section 6.

(From Morgan's Digest.)

1. All Deeds of Gift revocable under Kandyan law.—2. Consent of son not necessary to enable father to dispose of his property to obtain assistance.—3. Donations for assistance rendered also revocable subject to compensation.—4. When Deed turns out invalid, as an absolute transfer, transferee has a lien on the lands for expenses incurred.—5. Disinheriting clause necessary when the son is the only heir at law.—6. Brother's gift to sister irrevocable during her life.—7. Transfers of service parveny lands before 1809 valid.

All Deeds of Gift revocable under Kandyan Law.

1. Authorities appear to be conflicting as to the abstract right, by the Kandyan Law, of an owner of land to leave it away from his heirs at law. The balance of those authorities would appear to be in favour of that right.—*Morg. Dig. p.* 6 § 32.

Consent of son not necessary to enable father to dispose of his property to obtain assistance.

2. By the Kandyan Law, the consent of the son is not necessary to enable the father to dispose of his property in order to obtain assistance and support. Such a requirement would not only be unreasonable itself, but is at variance with the general rules of the Kandyan Law, and opposed to numerous decisions.—4380, Jud. Com. *Kandy*, (M.)—*Ibid. p.* 1. § 1.

Donations for assistance rendered also revocable subject to compensation.

3. A Donation in consideration of assistance to be rendered to the Donor, is by the Kandyan Law revocable, subject in certain cases to compensation for assistance actually rendered.—*Dodandenia* vs. *Koomare*, Govt. Agt. *Matelle*, (M.)—*Ibid p.* 7 § 37.

When Deed turns out invalid as an absolute transfer, transferee has a lien on the lands for expenses incurred.

4. In a case between Kandyan parties, where a person had transferred certain lands to enable him to procure support; *Held*, that even if the deed of transfer should turn out to be invalid as an absolute transfer, it should at least be considered that the transferee had a virtual mortgage on the lands for any expense which he might have actually been put to for the support of the

ransferor or the payment of his debts; and therefore that he had a right to hold the lands as a security for repayment.—*Ibid. p.* 1. § 2.

Disinheriting clause necessary when the son is the only heir at law.

5. This case was remanded back to the District Court to hear the evidence on both sides as to the plaintiff being the only son of the deceased Arawegeddere Naide Hamy by his first marriage. And *Per* CARR, J. The evidence hitherto taken in respect to the deed filed by the defendant is very doubtful and suspicious, though the defendant's witnesses are the most credible, especially as the Olah does not appear to be a new one; but by the Kandyan Law it is clear that the only son and heir cannot be disinherited by a voluntary Deed of Gift, or Will unless the cause of disinherison be expressly mentioned in it; and if the plaintiff be satisfactorily proved to be the only child of the deceased Arewegeddere Naide Hamy by his first marriage, his Deed would be wholly void against him, and he would be entitled, notwithstadning it, to succeed to his father's lands, subjeet to the life interest therein of the defendant, as his father's widow; unless by mutual agreement they like to divide the estate by taking half each [*No.* 3262, *D. C. Colombo*] (*C.*) *Dec.* 12, 1842—*Ibid p.* 345. § 737.

Brother's gift to sister irrevocable during her life.

6. The circustances under which a party, a Kandyan woman, had been put in possession of certain lands by her brother, were held to warrant the supposition that he had never intended that she should be turned out of possesion during her life. Her state of destitution after the first husband's death gave her a legal claim upon her brother for assistance; and her receiving a second husband at his hands was a natural and sufficient consideration for the gift of the land to her, at least for her life.—No. 6332, Govt. Agt. *Kornegalle*, (M.)—*Ibid. p.* 4. § 21.

Transfers of service parveny lands before 1809 held valid.

7. The principal point in this case is that the land in dispute being originally Service Parveny, and therefore not liable to be mortgaged or transferred; JEREMIE, J.—That, it appearing that the deeds bear date in 1804, whilst Governor North's Proclamations of 1800 and 1801 were in force, by which Proclamations "tenure of service was established," (though this tenure was subsequently revived in 1809), the tranfers were valid.—[*No.* 14,755, *D. C. Colombo, N.* (J.)—*Ibid. p.* 281 § 627.

Section 7.

(*From Austin's Appeal Reports.*)

1. Owner can dispose of his property as he pleases.—2. Clause containing reason necessary to disinherit the legal heir.—3. All Deeds except to Priests, whether conditional or unconditional, revocable.—4. A Deed of Gift for a portion of the estate, irrevocable.—5. Deed of Gift for the whole estate revocable.—6. Deed containing clause debarring donor from revoking, irrevocable.—7. Of donations the last is preferred.—8. Deed not invalid for want of attestation.—9. Deed requires proof.—10. Deed requires proof unless it comes from the proper custody.—11. If one ackknowledges another's title by Deed he cannot afterwards gainsay it.—12. Deed under Proclamation must be signed, not subscribed.—13. Deed once executed though nominally must be held valid.—14. Person executing a Deed in favor of another cannot maintain an actioon against a third in his own person.—15. Prescription does not hold good in a reovoable Deed.—16. Deed if revocable, grantee entitled to compensation.—17. Deed for the whole land is valid for a part.—18. Where Deed is not clear, intention must be ascertained.—19. Acknowledgement of debt without Deed before Notary and witnesses, sufficient.—20. Proof of Sannas.

Owner can dispose of his property as he pleases.

1. *Kandy, D. C.* No. 4380.—Held by the Supreme Court that the consent of the son and heir was not necessary to enable the father to dispose of his property in order to obtain assistance and support, and even if a deed of transfer should turn out to be invalid as an absolute transfer it should at least be considered that the transferee had a virtual mortgage on the lands for any expense which he might have actually been put to, for the su port of the transferor or the payment of his debts, and therefore that he had a right to hold the lands as security for re-payment * *Per Marshall. October 9. 1833.—Austin's Rep. p.* 20.

Clause containing reason necessary to disinherit the legal heir.

2. *Kandy D. C.* No. 5838.—Plaintiff claims certain lands by right of his deceased father *Keeralle.* Defendant admits *Keerale's* ownership, but pleads a *gift-talpot* in his favour from *Keerale,* and prescription. In the Court below,—"It has been proved that plaintiff is the son of *Keerale,* and as he was a minor when his father died the defendant's long possession will not give him a prescriptive title, and even admitting the genuineness of the *talpot* field by defendant, it does not appear that he maintained *Keerale,* for more than three months, or paid more than three *ammoonams* of his debts, for all of

* Morg. Dig. articles 1. and 2.—See also Marshall's "Judgments" page 309 where this case is fully reported.

which he has been more than compensated by his long possession. Decree for plaintiff." In appeal, "proceedings to be returned to the District Court for its explicit opinion where the *talpot* field by defendant is genuine or fictitious,—and if genuine, whether it can be considered sufficient to establish the disherison of plaintiff, containing as it does no mention whatever of the alleged services rendered by defendant. The Assessors state that even admitting it to be genuine, it would not by Kandyan law be sufficient in its present form to defeat the plaintiff's claim by right of inheritance." *Per Norris. January* 28, 1835.

The District Court returned answer that "the *talpot* was a genuine one, but that under the circumstances of the plaintiff's minority at the time of its execution, and the absence of all reason for disinheriting him, it cannot be considered as sufficient to defeat plaintiff's claim by right of inheritance." The decree of the Court below was thereupon affirmed. *Per Norris. May* 5, 1835—*Austin's Rep. pp.* 25, 26.

Kandy D. C. No. 22938.—Plaintiff as sole issue of the first marriage claimed a half of the estate of her deceased father *Nilleme*, defendant being the issue of his second marriage. Defendant however claimed the whole estate upon a Deed of Gift from his father *Nilleme* dated August 1838 (eleven years back) since which time he alleges an adverse possession, and pleads the benefit of the prescriptive ordinance. The Court below was of opinion that the defendant failed in proving his Deed as well as his adverse possession, for ten years, and having admitted plaintiff to be the issue of the first marriage, judgment was accordingly entered in his favour. In appeal *set aside*, and case remanded for further evidence in proof of defendant's Deed, and of his adverse possession, with plaintiff's evidence in reply, and for judgment *de novo*. "The plaintiff appears to have been very remiss in instituting her claim, as she admits that the Nileme died in 1841 (eight years before the institution of this suit,) and that defendant has held exclusive possession ever since his death. On the other hand the defendant alleges that the Nileme died in 1838, but the evindence of his witness as to adverse possession not being satisfactory, further evidence is desirable on that point. With regard to the Deed filed by defendant, as it contains no clause of disinherison, and assigns no reason for disinheriting the plaintiff, it would not under the Kandyan law debar her right to inherit jointly with the defendant her father's *praveny*

land, as being the sole issue of his first marriage,—but if the Deed be shown to be a forgery, such proof would not only tend to rebut the evidence of adverse possession, but the plaintiff might contend that in equity the fraud would debar the defendant's availing himself of any title from exclusive possession under such circumstances." *Per Carr. September*, 22 1882.

On the next trial day, the Court was of opinion that the Deed set up by defendant had been proved beyond doubt, and also that the Grantor died within a month or two after its execution "Defendant's *exclusive* possession therefore of these lands *exceeds* ten years, which of itself, independent of other considerations entitles him to judgment, which is accordingly entered up in his favour," In appeal affirmed. *Collective, March* 20, 1854.—*Austin's Rep. pp.* 142, 143.

Kandy, D. C. No. 27150.—In this case the Court below held that a Deed of Gift, away from the heir-at-law, should contain a clause of disinherison; and that the Kandyan law in this respect was not abrogated by the Ordinance No. 21 of 1844,—and thereupon dismissed the claim of the plaintiff who brought his action against the heir-atlaw upon a deed which did not contain the required clause. In appeal the case was "referred back to the Diatrict Court, to summon special Assessors, and with their assistance to find, 1st whether according to Kandyan Law, a Deed such as the one in question (a revocable Deed of gift) ought to contain an express clause of disinherison, and if so, in what specific terms? 2ndly, Whether if such clause be requisite, the deed ought to set forth also the reasons for such disinherison? 3rdly. To what degrees of affinity to the grantor, such requirements would extend? And 4thly. To specify in what district of the Kandyan Provinces such law prevails? Judgment be given accordingly," *Collective November* 19, 1856.

In accordance with the above order, specisl Assessors (Kandyan Chiefs) were summoned, and the following given as their unanimous opinion. 1st. A Deed such as the one in question to be valid, *must* contain a clause of disinherison. 2ndly. Such deed should set forth the reasons of disinherison,—such a failure to render assistance,— undutiful conduct,—ill-treatment,—or generally sueh conduct as is displeasing to the grantor. 3rdly. Such requirements extend as respects all persons who are the lawful heirs of the grantor, no matter how near or distant may be their affinity to him. And 4thly. This law or custom, so far as their knowledge extends.

applies to the *whole* of the Kandyan country.—"The Assessors having agreed with the law laid down in the judgment in this case, the same must therefore stand, and plaintiff's claim be dismissed,—defendant as heir-at-law being declared entitled to the lands in dispute."—*Austin's Rep. p.* 192.

Kandy, D. C. No. 28318.—Plaintiff claimed certain lands by right of inheritance from his grandfather. Defendant admitted that plaintiff's grandfather was the proprietor, but pleaded a Deed of gift from him. The following is the judgment of the Court below. "It has not in the Court's opinion been shown, that at the time of his death the admitted proprietor possessed any other lands save those in dispute. such being the case, and plaintiff being admitted to be his heir-at-law, it would become necessary according to Kandyan law (supported as it is by the Collective decision of the Supreme Court in case No. 21312 D. C. Kaigalle, and the judgment of this Court in No. 27150), that in Deeds such as the one now in question, the usual clause of disinherison should be inserted. On this ground therefore the Court considers, that the Deed under which defendant claims must be held to be an invalid instrument; and that plaintiff as heir-at-law of the admitted proprietor is entitled to judgment. It is decreed accordingly." In appeal offirmed, *Collective. September,* 9. 1858.—*Austin's Rep p.* 203.

Kandy, D. C. No. 21127,—The judgment of the Court below was as follows. It has been proved that the two brothers *Appoorala* and *Seeralle* (children of *Kaloo-hamy*) the father and uncle respectively of plaintiff had possessed the lands in dispute in common, and the deed from *Seeralle* (the uncle) to plaintiff has also been proved. It was contended by defendants Proctor, that plaintiff being a priest cannot acquire property, and that he consequently cannot maintain the present action. The authority of Mr, Armour * however founded as it is on a series of decisions of the late Judicial Commissioner's Court, is opposed to such a position. Although by the tenents of Buddhism a priest may be forbidden to acquire any property for his own use, his doing so would in the opinion of the Court only have the effect of disqualifying him from continuing in the priesthood, but would not prejudice his rights as a citizen. Assessors concur. Judgment

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* *Perera's edition, pp.* 51, 52.

for plaintiff." In appeal "modified by defendant being absolved from the instance with costs. The evidence taken is very unsatisfactory in support of plain iff's claim. The witnesses tend rather to show that *Kaloo-hamy* was married in *deega*, and defendant's mother who was *Kaloo-hamy's* sister by the same father in *beena*, and the Gift-deed from *Seeralla* must be viewed with much suspicion, as he has children living, and possessed other lands, and never performed service for the field in dispute, whilst he himself admi s (as intervenient in the case) that for ten or twelve years he has never resided in the garden in dispute." *Per Carr, September* 11, 1851.—*Austin s Rep pp.* 124, 125.

All Deeds except to to Priests whether conditional or unconditional, revocable.

3. *Kegalla D C.* No. 29890.—This was an action to eject defendant from certain lands which plaintiff had transferred to him upon Deed of Gift in September 1854, but which Deed she afterwards, in April 1856, wholly revoked. Defendant pleaded that plaintiff could not revoke the Deed of 854, inasmuch as by a clause therein contained she had renounced that right, as well as her right by Kandyan law to "alter, cancel, or break the same." On the day of trial, plaintiff's Counsel submitted that upon the pleadings, and according to the Kandyan law, his client was entitled to judgment. Defendant's Proctor urged that the Kandyan law being silent on the question raised in the present case, recourse must be had to the Civil law; and that the Deed, containing as it did a cl use by which the donor renounced all right to revoke the gift, must be held to be an irrevocable instrument. The following is the judgment of the Court below. "The Court is of opinion that the Kandyan law is not silent as regards the question now raised, and recourse must not therefore be had to the Civil law to determine it. The Kandyan law is that *all Deeds of Gift except those made to Priests and Temples, whether conditional or unconditional, are revocable by the donor in his life time.** It is true that there are exceptions to this rule, and some Deeds other than those to Priests and Temples, are expressly mentioned by Armour,† and the Deed of September 1854 cannot be considered as forming an exception, it being simply a Deed of Gift from a wife to her *beena* married husband, which she has the power of revoking whenever she may think fit. The Court considers that plaintiff is entitled

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* *Perera's Armour, pp.* 90-95.
† *Perera's edition.*

to judgment; and it is decreed that she be entitled to and quieted in the possession of the lands mentioned in the Libel, and that defendant do pav costs of suit." In appeal affirmed. *Collectivc, March* 20, 1858.—*Austin's Rep. p.* 214.

Kandy D. C., No. 34318.—*Manickralle*, the original proprietor of the land in dispute, transferred the same *verbally* to defendant some 30 years ago (since which time defendant possessed it) and subsequently he (*Manickralle*) executed a Notarial Deed of Gift for the same land in favour of plaintiff, upon which Deed the present action is founded. At the time of the transfer to defendant, no written instrument was necessary for that purpose, and there was no evidence as to the terms attached to the transfer at the time it was made. The Court below therefore after hearing evidence relating to certain alleged payments and gifts made by defendant with respect to this land in acknowledgment of *Manickralle's* title, was of opinion that the same was quite sufficient: and in the absence of more satisfactory proof, came to the conclusion that defendant's possession was *absolute*, and that the transfer to him was *unconditional*. Plaintiff non-suited. In appeal *set aside*, and decreed that judgment be given for plaintiff. "The Supreme Court concurs with the finding of the District Court that the lands in dispute originally belonged to *Manickralle*,—that the defendant received this land from him, and that *Manickralle* subsequently transferred the same to the present plaintiff by the Notarial Deed filed in the case. But the Supreme Court is of opinion that the gift from *Manickralle* to defendant was revocable during the life of *Manickralle*, and that he did revoke it by the subsequent Notarial Transfer to the plaintiff.* The Supreme Court is further of opinion that defendant has failed to prove a title by prescription against *Manickralle* and the present plaintiff, while the plaintiff has fully proved that defendant possessed subject to services rendered to *Menickralle*."† *Collective, July* 31, 1854.—*Austin's Rep. p.* 167.

Kandy D. C., No. 25217.—In 1839 *Menick Ettena* by Deed of gift made over to defendant the land in dispute. In 1850 she sold the same land to plaintiff upon a Notarial Deed, in which she alleges that she had previously transferred it to defendant, but that the latter having failed to render her any assistance, she now

* See Nos, 21344, and 22404. | † *Vide* No. 23886.

cancels that Transfers and sells the said lands absolutely to plaintiff. On the day of trial, an objection was taken to the Deed granted to plaintiff on the ground of insufficiency of stamp, because being also a Deed of *revocat on*, it ought to bear a higher stamp than that of a mere conveyance or Bill of Sale. The Court below however held that the Instrument was to all intents and purposes *a Deed of Sale* (being in itself a revocation of the former Deed granted to defendant), and as the stamp it bore was sufficient for a Deed of the kind, the objection was over-ruled and judgment entered for plaintiff. In appeal affirmed. *Collective, June* 8, 1855.—*Austin's Rep. p.* 173.

Kandy D. C., No. 26053.—Plaintiff claimed under a conditional Deed of Gift, and admitted that defendant was at least *one* of the heirs-at-law of his donor. Defendant having denied that plaintiff faithfully and fully performed the condition of the Deed (the rendering assistance), the latter was called upon to prove the same ; * but declining to adduce evidence, judgment was entered for defendant. In appeal *altered* into "defendant absolved from the instance." *Collective, January* 27, 1855.—*Austin's Rep. p.* 181.

A Deed of Gift for a portion of the estate, irrevocable.

4. *Kandy D. C.*, No. 473.—Plaintiff claimed a half of a certain land upon a Notarial deed executed in his favour by defendant.

Defendant admits the deed, but says that when she signed it, she did not know the contents. Upon reference to the deed, it would appear that it was a gift by a wife (defendant,) to her husband (plaintiff,) of the half claimed, in consideration of services rendered her by him in being instrumental in recovering back her paternal property from forcible possessors by a law-suit, and for clothing and feeding her for a year, and spending £ 15 for the said suit. The deed went on further to say, that if the plaintiff "cherished" her during her life-time, he would at her death become entitled to the other half also, and if *he* were to die first, his half was to revert to the defendant ; and in the event of a separation, each person was to possess a just moiety. It was after a separation that this action was instituted. Judgment for plaintiff, and in appeal, affirmed. *Per Rough, August* 14, 1834.—*Austin's Rep. pp.* 5, 6.

Kandy D. C., No. 9862.—Plaintiff rests her action for a certain land upon a Deed of gift executed in her

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* *Mar. Judg. p.* 323 § 47.

fovour by defendant, but in the possession of which land the latter still remains. The Court below held that the Deed could be revoked by the defendant at any time he pleased, and thereupon dismissed plaintiff's claim.* In appeal *reversed*, and plaintiff was declared entitled to recover the garden in question. "The assessors are of opinion that the Deed being a *formal* gift, is not revocable, and that such form of gifts is customary, where the grantor has some private reason for not expressly mentioning the motive or consideration for making the gift. The Court expressed a doubt moreover, upon its recollection of a former case, that the general rule in Kandyan customs of Deeds of gift being revocable, is liable to this exception,—that where the donor gives away his *whole* property, the presumption is that the grant *is* revocable, but it is otherwise where only a specific chattel or small portion of his estate is given away." *Per Carr, September* 3, 1838.—*Austin's Rep. p.* 43.

5. *Kandy D. C.*, No. 21314.—Plaintiff in this case claimed the southern moiety of a certain field upon a Notarial Deed of Transfer executed in his favour by one *Appoohamy*, in consideration of a previous debt due by the latter to plaintiff. The deed stated that the *whole* field had already been gifted by *Appoohamy* to his wife, for assistance to be rendered by her, but he now annulled the Deed of Gift so far as it related to the southern moiety, and confirmed the Deed in respect to the other moiety. Defendant (*Appoohamy's* wife contended that the Deed in her favour was not revocable, in as much as it was given "in consideration of assistance *already rendered for twenty-six years*, and also for the purpose of receiving assistance during his life-time." The Court below was of opinion that the Deed of Gift in favour of defendant was *not revocable*. "The kinds of Deeds that are revocable by Kandyan law, without any cause assigned are Donations made on account of natural affection or such cause, or Transfers in consideration of *future* services to be rendered. With respect to the latter however, though the transfer be revocable, yet the grantee is entitled to compensation. But the Court is of opinion that transfers made for a valuable consideration, whether pecuniary or for services *performed*, are not revocable at pleasure. Nor, considering the nature of the marriage-tie amongst Kandyans, should more strin-

Deed of Gift for the whole estate revocable.

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* See No. 23886.

gent rules be applied in respect to Deeds from a husband to a wife, than those between strangers. It is not pretended, nor has it been even insinuated by the plaintiff, that *Appoohamy* was in debt or contemplated any fraud at the time that he executed the transfer in favour of the defendant nor does he in the Deed in favour of plaintiff (under which the latter claims) impute any negligence or ill-conduct to the defendant; on the contrary it appears from the evidence that she continued to minister to her husband's wants till his death. It appears also that she had no knowledge of the Deed executed by her husband in favour of plaintiff. Plaintiff is therefore non-suited." In appeal, *altered* into judgment for plaintiff with costs. "The Kandyan law on this subject as laid down by Mr. Armour * seems to show that the gift in question is revocable, and does not come under the exceptions mentioned by him,—the principle laid down in case No. 22404 being also applicable to this case." *Per Oliphant, March* 25, 1850.—*Austin's Rep pp.* 127, 128.

Kandy, D. C., No. 23886.—In May 1839 plaintiff executed a Deed of Gift of certain lands in favour of defendants; but the latter having failed to render assistance (as conditioned in the Deed) to the satisfaction of plaintiff, this action to eject defendant was brought in November 1850. Defendant pleaded prescription; but the Court below held, that as the Deed was a revocable one, defendant's possession must be considered to be only as a trustee for the plaintiff,—in whose favour therefore judgment was entered. In appeal *amended* defendant being absolved from the instance. "The Court is of opinion, that although according to the Kandyan law the Deed of Gift from the plaintiff to her son the defendant is revocable, yet as it is a Notarial Deed, it can be altered or annulled only by an instrument of the same force; and the Ordinance No. 7 of 1840 requires also all transfers of land to be by Deed executed before a Notary and Witnesses. Until the plaintiff therefore revokes this Deed by such a Notarial Deed, she cannot maintain an action to recover back the land from defendant." *Per Carr, September* 12, 1851.—*Austin's Rep.* p. 159.

Deed, containing clause debarring donor from revoking, irrevocable.

6. *Kandy, D. C.*, No. 1564.—The original proprietors of the land in dispute as well as of the undisputed moiety were two sisters. They executed a deed of gift for the *whole* land in favour of their grandson the de-

* *Perera's edition, pp.* 90-95.

fendant. Subsequently the younger sister executed a fresh deed transferring *her* moiety to plaintiff (daughter of the elder sister,) and it was for *this* moiety the present action was brought. In the Court below the defendant's deed was proved, and as from its nature it was ir-revocable, it was held that it was not in the power of the younger sister to execute the subsequent deed in favour of her niece the plaintiff. Case dismissed. In appeal ordered that the case be returned to the District Court for information as to whether the District Judge conceived the deed executed by the two sisters in favour of defendant to be from its terms *absolutely irrevocable* as a matter of fixed Kandian Law. *Per Norris, March* 5, 1835.

In answer the District Judge reports "that the *general* rule of Kandyan Law on the subject of deeds of gift having effect in the life-time of the donor, is, that they are revocable by the donor in his life-time. To this rule however there is a direct exception of all gifts of lands to Priests or Temples. Some precedents may also be adduced from the late Judicial Commissioner's Court, of decrees (subsequently affirmed by His Excellency the Governor) which directly set forth the principle that where a clause is inserted by consent of the donor, expressly debarring him from the privilege of resumption, the deed is ir-revocable.* It would seem therefore that the deed was executed by the two sisters in fovour of the defendant is *ir revocable,* inasmuch as it contains the words *he shall possess the same without disturbance, and neither of us nor any descendant of ours can hereafter resume or give away the same.*" Upon this the decree of the District Court was affirmed, but ordered that the defendant do provide for the maintenance of the plaintiff, it appearing from the evidence of the witnesses on both sides that such was the intention of the grantors and the condition of the grant, to which the grantee had expressed his assent. *Per Norris, April* 22, 1835.—*Austin's Rep. p.* 15.

Kandy, D. C. No. 19064.—Plaintiff executed a Deed of Gift in favour of Defendant for certain lands, in consideration of past services and present assistance, but

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* See *Mahundara Mohottala* vs. *Mahala Sobita Oonnanse,* decided September 4, 1817, and affirmed in appeal December 15, 1819. Also *Mugahagay Bandulahamy* vs. *Galagodda Dissawe,* decided February 14, 1822, and affirmed in appeal March 19, 1825.

defendant having subsequently abandoned plaintiff, this action was brought to eject him from those lands. The Deed says that "neither I myself, nor any of my descendants whomsoever, can make any dispute in future regarding these lands." The Court below considered that the Deed in the present case was revocable, and that If a donor could revoke a Deed by the execution of another, there was nothing to prevent his having it affected by the judgment of a Court.* It was also held that a donor was not required to assign any reason for such revocation. In appeal the point was relied upon that the doctrine of revocation was not applicable to the facts of the present case, because the plaintiff had by her Deed expressly debarred herself of the privilege of so revoking it. The Supreme Court however affirmed the judgment. *Per Temple, September 7, 1847.—Austin's Rep pp.* 103, 104.

Kandy, D. C. No. 25970.—On the day of trial the Counsel for plaintiff contended that on the Pleadings and examination of parties, his client was entitled to judgment; for that the Deed filed by him and under which he claims, is not denied either by defendant or Intervenient, and must therefore taken to be admitted; and that the Deed filed by Intervenient, even supposing is to be a genuine one (which however is denied), is a revocable one, and must therefore be taken to have been revoked, (the Deed to plaintiff being admittied and being of subsequent date). He therefore called no witnesses but moved for judgment at once. The Counsel for defendant and Intervenient maintained that plaintiff's case was incomplete, inasmuch as though there was no denial by his clients of plaintiff's Deed, yet it must be *proved*; and even *if* proved the Intervenient must under the Kandyan Law be re imbursed the expenses he may have been put to, in paying the donor's debts, &c., in terms of the bequest to him, before he could be ejected from the lands. He also therefore called no witnesses, but removed for a non-suit. "There are three points for the consideration of the Court in this case. 1st. Does necessity exist for the Deed filed by plaintiff being proved? 2ndly. Is the Deed filed by Intervenient (if genuine) revocable or not? And 3rdly. Can Intervenient under any circumstances be ejected from the premises in dispute, until compensation be made to him for the expenses he may have been put to, in paying the

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* See, however, decision in No. 23886.

donor's debts,—rendering him assistance, &c. ? As regards the first point, the Deed filed by plaintiff is in his Libel specially alleged, and it is under that he claims: and as not denied by either defendant or Intervenient, must be held to be admitted. No proof of execution is therefore required. As regards the *second* point, there can be no doubt that the Deed filed by Inervenient is a revocable one, for it contains no clause debarring the donor from revoking the gift,—which would be necessary to make it ir-revocable.* With regard to the *third* point, it is clear that Intervenient would have a claim for compensation against the last donee, in respect of any expenses he might have been put to in paying his alleged donor's debts, provided the Deed filed by him was admitted by plaintiff, which however is not the case; he must therefore first prove his Deed, and under no circumstances would this claim give him a lien on the lands bequeathed, which claim should form the subject of a separate action against the last donee or donees. It is admitted by defendant and Intervenient that plaintiff's donor was the original proprietor of the lands in dispute, and plaintiff by virtue of the Deed filed by him is entitled to judgment, which is accordingly entered for him." In appeal affirmed. *Collective, August* 25, 1856.—*Austin's Rep. pp.* 177. 178.

7. *Kandy, D. C.* No. 1456.—Poonchy Ettena executed a gift-deed in favor of defendant, and subsequently granted a similar deed for the same property to plaintiff. After the donor's death, defendant being in possession of the property, this action was brought by plaintiff to eject him. Both deeds having been proved, and both being notarial, the Court below gave the preference to the *second* or that filed by plaintiff, "according" as the judgment says "to the established customs of the country. As, however, defendant has proved that he rendered some assistance to the deceased Poonchy Ettena, the plaintiff should make due compensation to him for it. Decreed that plaintiff be entitled to the house in question, and that she do pay to defendant the sum of £7 10 in satisfaction of his claims for assistance rendered." *Per Norris, January* 29, 1835.—*Austin's Rep p.* 14.

Of donations the last is preferred.

Kandy, D. C. No. 22404.—The following is the judgment of the Court below. "In this case the question is, whether the late *Appo* who is admitted to have transferred the land in dispute to defendant, by Deed

* *Perera's Armour, p.* 95.

dated 14th October, 1857, had a right to revoke that Deed by the one which he is alleged to have executed in favour of plaintiff in May 1848, and which Deed has been proved * There is no part of Kandyan law which in the opinion of the District Judge is in a more unsettle state, than the power of revocation of Deeds. In such cases and in all other cases of doubt, the Court must construe the Law by the rules of natural equity. In this case there is no evidence to show that the defendant (the first grantee) did not perform the conditions on which the land had been assigned to him, and the fair presumption therefore is, that he *did* continue to perform them till the death of the Grantor. There is no proof that the defendant had any knowledge of the Deed in favour of plaintiff,—on the contrary, it appears that he continued in the undisturbed possession of the land, and cultivated it for a considerable time before the Grantor's death, and *until* his death (which took place about a year ago) and has done so ever since. The District Judge is of opinion that the Law could newer have intended to have given the owner of property, the power of rescinding a Deed and transferring it to a third party under the foregoing circumstances; or in other words, that a person who has assigned land to another in consideration of assistance to be rendered, has not the right of rescinding such Grant if such assistance has been rendered, and under *no* circumstances without the knowledge of the first grantee, and without compensation being made to him. Judgment for defendant." In appeal decree *altered* into judgment for plaintiff with costs. "The Kandyan Law is clear on this subject,—namely,—that the last donee of lands for assistance to be rendered, has the preferent claim, and that if any donee has been subjected to any disbursement out of his funds, it his for him to prove it, the assumption being that the lands given left him harmless during the time he rendered assistance."† *Per Oliphant, March* 25, 1850. —*Austin's Rep. p.* 140.

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* Both Deeds are merely for assistance to be rendered,—the second one making mention of the first, and cancelling the same.

† *Perera's Armour, pp.* 90-95. See also *Mar. Judg. p.* 322.

Kandy, D. C, No. 19866.—This was an action brought in 1846 upon a Deed dated 1838, which deed did not contain the *signature* of the Grantor but merely his *mark*, and was attested by a Notary of the District of Four Korles whereas the land mentioned in the Deed was situated in the District of Matella, and ought therefore to have been attested (according to the Ordinance No, 7 of 1834*) by a Notary of the District wherein the land was situated. The Court below non-suited the plaintiff, but in appeal *reversed* and case remanded to proceed in due course. "It appears from the Deed that it is signed by the Grantor by a mark, and the mere fact of a Deed not being attested &c., by a Notary of the District does not invalidate the Deed by the Ordinance No. 7 of 1840, sec. 14." *Per Stark. December* 7, 1848.

Deed not invalid for want of attestation.

On the next trial-day, the Proctor for plaintiff proposed to read in evidence the statement of one *Nayda* deceased, who was a witness in a former case between the same parties and for the same lands, and which case had been duly produced by the Secretary. The Court was of opinion that before the statement of a deceased witness could be read in evidence, his identity must be clearly established, which not having been done in the present case the motion was disallowed, and the case having been proceeded with, the plaintiff was non-suited. In appeal *set aside* and case remanded for hearing. "Legal evidence was tendered,—the evidence of a deceased witness in a former suit between the same parties, and for the same lands as it should seem was rejected." *Per Oliphant. March* 8, 1851.—*Austin's Rep. p.* 113.

Kandy, D. C., No. 26121.—The Libel states that the lands in dispute belonged to 1st plaintiff, and that he transferred them to 2nd, 3rd, and 4th plaintiffs upon the Notarial Deeds of Gift marked A. B. and C., for assistance to be rendered. Defendant being in the forcible possession thereof, the 1st plaintiff prays that the 2nd, 3rd, and 4th, be declared entitled to, and quieted in the possession of the said lands. Defendant denied that these lands belonged to 1st plaintiff, or that he ever executed the Deeds in favor of the other plaintiffs: On the day of trial 1st plaintiff in his examination admitted that he executed the Deeds in question; upon which evidence was called only to prove his title, and the case for the plaintiffs was closed. Defendant's Counsel then moved

Deed requires proof.

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* Repealed by No. 7 of 1840.

for a non-suit on the ground that plaintiffs had not proved the *most material* part of their case, namely the Deeds. Plaintiff's Counsel in reply contended that 1st plaintiff who is a party on record having admitted the Deeds, it was unnecessary to call witnesses to prove them, and cited Kandy D. C. case No. 20352 in support of his argument. The Court below was of opinion that 1st plaintiff's right and title to the lands had been established, but in the absence of any *legal evidence of title* in the other plaintiffs, the Court was not in a position to grant the relief prayed for in the Libel. "When a Deed or Instrument produced, purports to have been attested before one or more witnesses whose names are subscribed, one of them at least must be called; so rigid indeed is this rule, that it seems it is not even superseded in the case of a Deed by proof of an admission or acknowledgment of the execution by the party himself.* Defendant is therefore absolved from the instance with costs." In appeal *set aside*, and case remanded to enable the 2nd, 3rd, and 4th plaintiffs to prove their respective deeds, and to give judgment *de novo*. "The Supreme Court fully concurs with the judgment of the District Court as to the lands having formerly belonged to 1st plaintiff, and his right to execute such Deeds; but the Court cannot thereon now adjudge the lands to 1st plaintiff in face of his own admission on the record, that he had transferred them to others. Nor can it decree the other plaintiffs to be put in quiet possession thereof under their Deeds, when no attesting witness thereto has been called to prove the same, and their validity has been wholly denied in the Answer by defendant who says that they are not the Deeds of the 1st plaintiff, who was not of sound mind." *Collective. July* 1, 1854.—*Austin's Rep.* *pp.* 181-182.

Deed requires proof unless it comes from the proper custody.

Kandy, D. C., No. 26342.—Plaintiff as vendee of Intervenients *Dingiry Menica* and *Kiry Menica* (the widow and daughter respectively of *Poonchyralle* deceased) claimed certain lands; and with his Libel filed two talpot Deeds, one purporting to be in favour of *Manickralle* the original proprietor, and the other from *Manickralle* to *Poonchyralle* (*Kiry Manica's* father). On the day of trial, plaintiffs' Counsel submitted that both these *talpots* being more than 30 years old, no proof of their execution was necessary, and therefore moved that they be received in evidence. This motion was refused

* Starkie Evid. 3rd ed. vol. 1. p. 371.—Roscoe Nisi Prius. p. 87.—Phillipp's Evid. 9th ed vol. 2. p. 202.

because they ought to have been produced from the proper custody,* provided otherwise some account be given of them as to where they were found &c. † "Now it is here admitted that when *Kiry Manica's* father died, she was a child of only two or three years of age, and that her mother *Dingiry Manica* had left the village and contracted another *deega* marriage, and that *Kiry Manica* was placed under the guardianship of defendant's father who held these lands. The Deeds could not have been in *Kiry Manica's* possession after her father's death, and some proof is clearly necessary to show how these documents came eventually into her possession especially as plaintiff in his Libel asserts that defendant's father during his life-time neglected to give *Kiry Manica* any share of the produce of the lands,—thus disputing her title. There being no such proof, and the evidence in regard to *Kiry Manica's* father's possession being contradictory, plaintiff is non-suited." In appeal *set aside,* and case remanded for further evidence and judgment *de novo,*—"The Supreme Court being of opinion that the Deeds tendered in evidence by the plaintiff are receivable, coming as they do out of the possession of the plaintiff and Intervenients who claim title thereunder." *Collective. November* 28, 1856.—*Austin's Rep. pp.* 185–186.

If one acknowledges another's title by Deed he cannot afterwards gain say it.

Kandy, D. C., No. 12707.—*South Court.*—In this case plaintiff seeks to recover from defendant who was his nephew, certain lands which he states were given by him to defendant four years ago (1835,) upon a Notarial Deed (a copy of which is filed,) for assistance to be rendered, but which assistance, plaintiff states, was never rendered. Defendant denies he ever got the lands in question in such manner, and states that they form portion of his hereditary property; and that the Deed referred to was executed without his knowledge, and must have been "got up" with a fraudulent object. He further pleads prescription. The Court below was of opinion that plaintiff's witnesses proved *defendant's* right to the land in dispute, and consequently dismissed plaintiff's claim. On appeal, the Supreme Court referred back the proceedings for further evidence on both sides and judgment *de novo*. "If the defendant was present at the execution of the plaintiff's Deed and received the same from him, it would itself be an act, from which an acknowledgment of a right existing in the plaintiff, might fairly and naturally be inferred, to bar the defendant's claim by pre-

* Starkie Ev, p, 618. | † Roscoe's ev, p, 20.

scription. The Notary and Witnesses should therefore be more clearly examined, as to what was said or done by the parties at the execution and delivery of such Deed. Though the defendant's father and the defendant are stated by the witnesses to have cultivated the field in dispute, yet it would appear that they got the same from the plaintiff. and it is not stated on what terms they held them, possibly it might have been in *Ande* only, or for performing service for the plaintiff. The possession by the defendant to the *Mool-talpot* and the tax-receipts since 1836, are not moreover inconsistent with the plaintiff's story of having conditionally transferred to defendant in 1835, the land by the Deed filed." *Per Carr. August* 31, 1842.

The Court below then heard evidence on both sides and was of opinion, " that the plaintiff had entirely failed to prove any Deed of the kind was ever executed, and that even *if* executed, the same was never delivered to defendant, and it must be presumed therefore to be in the possession of the plaintiff. It is indeed a suspicious circumstance, that after having executed a Deed, the plaintiff should have withheld it from the defendant assigning as a reason for doing so that *he would first see how defendant would render him assistance.* With the exception of the Deed which has not been proved, there is no evidence of any other *act by the possessor* (*the defendant,*) *from which an acknowledgment of a right existing in another person could fairly and naturally be inferred,*—for the Court cannot consider that the mere delivery once or twice of some rice by defendant to plaintiff considering their relationship, amounts to such an act. Judgment for defendant." In appeal decree altered into " defendant absolved from the instance." *Per Oliphant. February* 1, 1844.—*Austin's Rep. pp.* 50-51.

Deed under Proclamation must be signed, not subscribed.

Kandy, D. C., No. 18135.—The Supreme Court thinks that without hearing the evidence as to the execution of the defendant's Deed, no decision can be properly made as to its due execution or not. The Proclamation of 1820 * requires the party to *sign* and not to *subscribe*, and a Will may under that Proclamation be signed by a Testator at the top ; † and it would be sufficient also under that Proclamation if the Testator acknowledged his handwriting to the witnesses, as the

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* Repealed by Ordinance No. 7 of 1834, which again was repealed by No. 7 of 1840.

† *Hilton* v. *King*, 3 Lev. 86.

mere act or *factum* of signing need not be repeated."* *Per Carr.* *February* 24, 1847.—*Austin's Rep. p.* 92.

13. *Kandy, D. C.*, No. 4707.—Where a woman executed a deed conveying certain lands to her husband, (whose rank exempted his lands from taxes and services,) afterwards endeavoured to set the deed aside as not being and intended to operate as a real transfer, the Supreme Court considered it clear, that inasmuch as she had declared to the Revenue Commissioner that the transfer to her husband was *final and beyond the power of her reclamation*, it must be held binding upon her. If she intended to make the reservation now contended for, her object must have been to defraud the Government of the grain tax and road service, but the law would permit no one to avail himself of his own fraud. † *October* 8, *and December* 5, 1833.—*Austin's Rep. p.* 21.

Deed once executed though nominally must be held valid.

14. *Kandy, D. C.*, No. 656.—Plaintiff admits that he is the person who granted to the plaintiff in a former case, the *Talpot* or *Deed* on which that plaintiff brought his action for the same land as now claimed, against the same defendant. Under the circumstances the Court below held, that plaintiff's claim was inadmissible, for having transferred his title to another, he can have no right to come forward and claim the same property from the defendant, after the person to whom he had transferred the land in question had tried his right and title to it by due course of law against this defendant and had been non-suited, against which decision no appeal was made. Claim therefore dismissed with costs and in appeal affirmed. *Per Rough.* *August* 14, 1834.—*Austin's Rep. p.* 9.

Person executing a Deed in favor of another cannot maintain an action against a third in his own person.

15. *Kandy, D. C.*, No. 29951.—One *Manickralle* in 1838 upon an unconditional Deed of Gift, transferred certain lands to his son, the present plaintiff, who thereupon entered into possession and continued therein till April 1857, when the defendant by virtue of a Deed of Sale to him by the said *Manickralle* dated February 1857, entered into possession and ousted the plaintiff. Hence this action. The defendant's plea was the sale by *Manickralle*; but the plaintiff in his Replication insisted that inasmuch as *Manickralle* had in 1838 parted with the lands, he had no right in 1857 to convey them to defendant, and that the plaintiff by his intermediate possession of nineteen years had acquired a title by prescription in

Prescription does not hold good in a revocable Deed.

* *Lemayne* v. *Sterling.* 2 Ves. 454.
† *Mar. Judg. p.* 199.

terms of the 2nd clause of the Ordinance No. 8 of 1834. On the day of trial the Intervenient (*Manickralle*) was examined, when he admitted the possession of his son from the time of the gift to the date of the sale to defendant. Hereupon the Court below decided that the admitted possession on the part of plaintiff for upwards of ten years previous to the sale, had given him a title by prescription, and that the power of revocation which existed in a donor by the Kandyan Law, did not operate to the prejudice of such title. In appeal, *set aside* and case remanded for hearing. "The Supreme Court does not consider that the plaintiff has obtained a prescriptive title, as it could not be held that a Deed of this kind was only revocable within ten years." *Collective. November* 30, 1858.

At the second trial the Deeds on both sides being admitted, and it also being admitted that the Deed of gift in plaintiff's favor was *unconditional*, the plaintiff's Counsel moved for judgment on the ground of prescription. The Court below held that "plaintiff having an admitted undisturbed and uninterrupted possession for ten years and upwards, is entitled by law (irrespective of any Kandyan custom or usage whatsoever, such custom or usage not being included in the explanation of the terms *adverse or independent* as set forth in the Ordinance) to the benefit of the 2nd clause of the Ordinance No. 8 of 1834; and that *Manickralle* had no title to give to defendant, in that *he had no possession of the land of any kind whatever for ten years immediately preceding the sale.* Judgment therefore for plaintiff." In appeal *set aside*, and judgment entered in favor of defendant. "The Supreme Court having in this very case on the 30th November decided that the *plaintiff had not obtained an adverse prescriptive title, as it could not be held that a Deed of the kind referred to was only revocable within ten years*, it now feels bound by that decision, and cannot allow the same to be questioned. *Collective, June* 29, 1860.—*Austin's Rep. pp* 218-219.

Deed if revocable, grantee entitled to compensation.

16. *Kandy D. C.*, No. 25308.—Plaintiff claimed certain lands in right of her deceased father *Kalooa*, and complained that the defendant took forcible possession thereof claiming title under a certain transfer from one *Garroo* dated 1849. That the said *Garroo* knowing that she had no right to make the transfer, subsequently (in 1851) revoked the same by another Deed, in which she acknowledged the right of plaintiff. The defendant pleaded that *Garroo was* the owner and had possessed

the lands,—that the transfer was made in consideration of services already rendered and therefore could not be revoked,—and further that the Deed of 1851 was obtained by fraud and collusion. On the day of trial plaintiff's Counsel contended that the Deed by *Garroo* to defendant was revocable, and that *Garroo* had admitted plaintiff's title in the subsequent Deed. Defendant's Counsel maintained, that plaintiff's claim was adverse to that of *Garroo* who was no party to the suit, and whose admission could not bind defendant; and that *Garroo's* right to revoke the Deed of 1849 can only be tried in an action between *Garroo* and the defendant. Neither party calling witnesses, the Court below absolved the defendant on the ground that plaintiff had adduced no evidence either in support of her title, or that she was the daughter of *Kalooa*. "The admission of *Garroo* cannot possibly conclude defendant. Plaintiff was bound to bring evidence in support of her title as laid in the Libel. Even admitting that *Garroo* had a right to revoke the previous Deed, it can in no way assist plaintiff's case,—as she can only succeed on the strength of her own title to eject the defendant from the premises in question." In appeal *set aside*, and case remanded for a new trial with liberty to amend the Pleadings. "It appears to the Supreme Court that the plaintiff may set up title either as derivable by descent from *Kalooa*, or under the Deed of gift from *Garroo*, or both. The defendant can then deny plaintiff's title from *Kalooa*, and set up the Deed in his favour. To which plaintiff can reply that the deed was revocable, and *was* revoked; and the defendant can rejoin that such Deed was *not* revocable, or that if revoked he cannot be put out of possession without being repaid the expense of assistance rendered by him; and that the plaintiff's Deed is void as being fraudulently obtained; and the parties can join thereon." *Collective. May* 12, 1853.

On the next trial day, no evidence was called, nor yet had the Pleadings been amended,—the plaintiff's Counsel persisting that it was unnecessary, inasmuch as his client was entitled to judgment as they now stand. The Court however disagreed with him. "*The Answer specially denies* plaintiff to be the daughter of *Kalooa* under whom *alone* she now claims, and since she calls no evidence to prove such title, she is non-suited with costs." In appeal affirmed. *Collective. September* 9, 1856.—*Austin's Rep. pp.* 175-176.

17. *Kandy, D. C.*, No. 8644.—Plaintiff in her Libel claimed one *pela* of land by virtue of a gift *talpot* from

Deed for the whole land is valid for a part.

her deceased brother. On the day of trial she admitted that her brother only possessed *a half* of the *pela*, but that he executed the deed for the *whole*, as he considered himself entitled to it, although defendant possessed the other half for a very long time. She however now relinquished her right to that half, and claimed only the moiety of which her brother died possessed. Defendant's Proctor objected to the validity of plaintiff's Deed inasmuch as it purports to convey the whole *pela* for which this action was brought, whereas it now appears by plaintiff's own showing that her brother had no right to execute a Deed for the whole: and therefore if that Deed be invalid for the *whole*, it must equally be so for a *part* of the land in question, and consequently the present action cannot be maintained even for a part, as no evidence can be allowed to be adduced in support of such part only. Had the action been confined to that part, a different defence might have been made. The Court below over-ruled the objection. "Although the Deed purports to convey more than the donor may have been legally entitled to give away, it may be considered invalid only for so much as the donor had no right to transfer, but cannot be taken to destroy the right which he may have had to the remainder. The plaintiff is surely at liberty to relinquish any part of her claim, even on the day of trial; nor does the Court think that in doing so (especially in the present case) the defendant's position is at all changed, or that he is less prepared to rebut a claim for a *half* than he would have been for the *whole* land, the ground of action being the same. The evidence which plaintiff is prepared to adduce in support of the Deed filed, would not vary the terms of that Deed; and although they proved it to be a genuine Deed for the whole *pela*, yet that would be no reason why the Court should reject their testimony in support of a title to a part only of that land." In appeal affirmed. "It is now ordered that the parties do proceed, the plaintiff being permitted to give evidence as by the Court below ordered. It should be made known to the Practitioners that the Supreme Court will decide upon all Interlocutory orders of District Courts without reference to the assent of parties.* So also in Criminal cases of appeal." *October 25, 1837.—Austin's Rep. pp. 38–39.*

Where Deed is not clear intention must be ascertained.

18. *Kandy, D. C.*, No. 11954.—*South Court.*—Plaintiff claimed the lower five *lahas* of a field of two *pelas*

* Groenewegen de legibus abrogatis.—Digest lib. 42. Tit. I. C. 14.

in the whole, which he says defendant sold him, and of which he states he had been in possession since the sale. Defendant admits that he sold plaintiff two *pelas*, but that the field in question is two *pelas* and five *lahas* in extent, the five *lahas* now claimed being what he had reserved for himself. The Deed filed by plaintiff says, "I hereby sell the land belonging to me, to wit the field A of two *pelas* in extent." The Court below was of opinion that from the terms of the Deed the defendant intended to sell and convey *the whole* of the field, and therefore called upon the defendant to shew by evidence that such was not his intention. He however called no witnesses, whereupon the Court examined the Notary, who stated upon oath that *he* understood the whole of the field to be conveyed, otherwise the wording of the Deed would have been different. Judgment for plaintiff, and in appeal affirmed. *Per Oliphant. January* 31, 1844.—*Austin's Rep. pp.* 48-49.

19. *Kandy, D. C*, No. 22401.—On the day of trial, the Notary who attested a certain Deed, was called as a witness for the plaintiff to prove the same; but defendant's Counsel objected to its being read and admitted in evidence, on the grounds, 1st. That the same was not executed in duplicate as required by the Ordinance No. 7 of 1834 * which was then in force; and 2ndly. That at the time the Grantor signed the *Olah*, nothing had been written thereon, and therefore it was not a Deed. The Court was of opinion with respect to the first objection, that although the Ordinance directs all Deeds which require the attestation of a Notary, to be executed in duplicate, yet it does not declare that a Deed shall be void by reason of its not having been so executed. And with respect to the second objection the Court held, that as there was evidence that the Grantor acknowledged the execution of the Deed in the presence of a Notary and witnesses, *that* was a sufficient compliance with the Ordinance. Objection therefore over-ruled, and in appeal affirmed. *Per Temple. December* 31, 1849.—*Austin's Rep. p.* 139.

Acknowledgment of debt without Deed before Notary and witnesses, sufficient.

20. *Kandy, D. C.*, No. 28620.—In appeal *remanded* for a new trial to let in further evidence. "The Supreme Court is of opinion that further evidence may be adduced to throw light upon the genuineness of the *sannas*. This evidence should relate to the language in which the *sannas* is expressed, and its correspondence with the style

Proof of Sannas.

* Repealed by No. 7 of 1840.

in use in the like instruments of the same period; and the opinion of learned persons skilled in the *Pali* language should be taken on this point. It should also be ascertained whether the description of the highlands by boundaries as given in this *sannas* was customary; and comparison should be made with other *sannases* of unquestioned genuineness. The evidence should also show in whose custody the *sannas* has remained, and should account for the long delay in giving notice of its existence. Costs to stand over." *Collective. January* 18, 1860.—*Austin's Rep. p.* 207.

Section 8.

(From Beven & Siebel's Appeal Reports.)

1. All Deeds of Gift for services rendered and to be rendered revocable.—2. Deed of Gift for a portion of the Estate reserving a substantial share for himself and his heirs is irrevocable even without a clause of disinherison.—3. Donee's death during donor's life-time, no reason for deed to become inoperative unless revoked.—4. Deed though revoked by donor after donee's death, when irrevocable.—5. Talpot deed when admits of proof.

All Deeds of Gift for services rendered and to be rendered revocable.

1. *D. C. Kandy,* No 28626.—Plaintiff by deed bearing date August 1846 granted two specific portions of land to defendant, and in February 1851, granted the same to second plaintiff. This action was raised to recover possession of the lands, on the ground that the deed of gift was revocable. Defendant consented to five lahas of the land being decreed to plaintiff, but contended that the other portions claimed in the libel were transferred to him in *paraveni* in consideration of past assistance.

Edema for plaintiff. All Kandyan deeds of gift are revocable, and therefore first plaintiff has a perfect right to revoke the deed he granted in favour of defendant.

Vanderwall contra. The deed has two grants, one for services already rendered, and one for services to be rendered, and must stand irrevocable and be looked on as a bill of sale in respect of the lands granted for services already rendered.

W. H. Clarke, D. J., gave judgment as follows: The Court having carefully considered the first plaintiff's deed of gift to defendant, is of opinion that it must be

viewed as one instrument, and that its clauses cannot be severed. The intention of the donor was to convey certain lands for assistance "rendered and to be rendered," and the Court thinks that the distinction ingeniously drawn by defendant's Advocate will not hold good. But, even supposing the two parts could be read separately, even then, the grant referring to the lands given for past services is only a gift and not a sale. True, consideration is in some sort specified, but to a deed of sale, actual purchase and actual payment of money is essential. The deed terms itself a deed of gift, "deed of absolute gift," and such it is to all intents and purposes.

That by Kandyan Law such deeds are revocable cannot be doubted, and defendant can seek for compensation from his revoking donor who has revoked, not verbally, *but by subsequent deed.* There is no clause in the present deed specially barring the donor from revocation, but only the usual Kandyan form of renunciation of right Such appears to be the law as laid down in *Armour* pp. 180, 182 * *Marshall* 322. See also Supreme Court decisions in *Kandy D. C.* 21344 and 22504.

The decree therefore must be that the 1st plaintiff as donor, and 2nd plaintiff as his last donee do have and recover the lands claimed in the libel; and that defendant do pay plaintiff's costs, so far as they were incurred subsequently to November 16th 1855, it not being clear that defendant knew of or was acquainted with the revocation.

Against this judgment the defendant appealed on the grounds: (1) Consideration for past assistance, and the deed containd two distinct grants. (2) The authorities cited by Court did not establish the rule that a grant of this kind is revocable (3) The intention of donor is so clear as to exclude his right of revocation. (4) It would be inequitable to deprive defendant of that portion granted to him for past services without compensation.

In appeal *affirmed,* (25th August, 1857.) The Supreme Court feels itself bound to follow former decicions which establish the doctrine that deeds as well for services previously rendered as for those to be rendered in future, are by the Kandyan Law revocable. (See Kandy *D. C.* 22404 and 21344 (25th March, 185), 23886 (12th September, 1851), 24318 (31st July, 18 4), 14253 (Badulla 5th July, 1854), and 44271 (30th August, 1844).—*Bev. & Sieb. Rep. pp.* 52–53.

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* *Perera's edition, pp.* 91–93.

Deed of Gift for a portion of the estate, reserving a substantial share for him and his heirs irrevocable, even without a clause of disinherison.

2 *D. C. Kandy*, No. 33108.—The plaintiff claimed one half of certain lands by paternal inheritance, from Jay Appoo, alleging that the other half belonged to her sister, the 1st defendant, the other defendant being married out in deega and having forfeited her right. The 1st defendant pleaded a deed, A., dated 12th November, 1853, from her father; and the 2nd defendant a deed B., dated 22nd September 1856. Smedley, D. J., held that the deeds were bad for want of a clause of disinherison and entered up judgment for plaintiff. In appeal the judgment was set aside, and case remanded for a new trial, "to ascertain as nearly as possible what proportion of the grantor's estate was exhausted by the deed A. Was it all, or nearly all, or a half, or a third; or was it only a trifling part? Similarly with regard to deed B. How much of the estate which Jay Appoo had on the day of that grant was comprised in that grant? If the whole, or nearly so, or a half, or a third; or was it only a trifling part?" (18th July, 1862.)

At the second trial Berwick, D. J., found that at date of execution A., Jay Appoo's property was of the value of £385, and that by deed A. he transferred property of the value of £260. He therefore held the deed A. valid. He further found that of the remaining property worth £125, he transferred by B. lands worth £64, leaving property worth £61 to himself and heirs. As this was a substantial and not illusory reservation, he held deed B. to be valid also. He states in his judgment; "it does not appear that the distinction between a *total* disinherison (or what is the same thing, a colourable but illusory reservation of property) and a partial disinherison had been presented to my esteemed predecessor Mr. Smedley in argument. But if it were so, still I have no doubt that the Kandyan law recognized such distinction, and that it is only in the event of the first case that express words of disinherison are required in a deed of donation to a child. My own views on the point of Kandyan law quite concur with the views expressed by Mr. Murray, in his judgment in Kandy District Court case 33279." Plaintiff's case was dismissed. In appeal affirmed. (20th November, 1868.)—*Bev. & Sieb. Rep. p.* 146.

Donee's death during donor's life-time no reason for Deed to become inoperative unless revoked.

3. *D. C. Kandy*, No. 61455.—One Durealagedera Ponna, granted certain lands by deed of gift to his second wife and to his daughter by his first wife in equal shares, partly for past services, and partly to ensure a continuance of such assistance during donor's life. The second wife died a few years before the donor, leaving

plaintiff her son and sole heir at law who became entitled to her share of the lands Defendant maintained that inasmuch as the second wife predeceased the donor and the conditions of the deed were not fulfilled, the share of the lands gifted to the second wife reverted to the donor and on his death descended to his daughter, 1st defendant.

VanLangenberg for plaintiff contended that as the deed was unrevoked and the gift was to the donee, her heirs and assigns in consideration of services rendered for a series of years, the property should pass to the donee's heirs, she being dead. The principle was clear from the decision of the Supreme Court in *Matale C. R.* 1955. *Legal Mis. p.* 78 *Civil Minutes* 15th November, 1866.

Eaton for defendant urged that (1) as the consideration was as well for services to be rendered, the death of the donee before the donor rendered the deed inoperative. (2) The Matale case did not apply, as the decision there proceeded upon other grounds.

The District Judge (A. C. Lawrie) dismissed plaintiff's action on the ground that the deed of gift became inoperative by reason of the donee's death during the donor's life-time. "Under the older Kandyan law no one could claim under a deed of gift who had deserted the grantor and failed to render the contemplated assistance up to the day of his death, for a deed of gift was looked on as a *quasi* contract in which, on the one hand, the donee tacitly engaged to render assistance for the rest of the donor's life; and on the other, the donor rewarded such care and purchased its continuance by a gift of land accompanied with immediate possession, but liable to be revoked. It naturally followed that on the occurence of any event which made it impossible for the donee to render further assistance, whether that event were deega marriage, death, &c., the gift fell even without a formal revocation against donor. It seems to me that this is a safe and reasonable rule to follow in all cases where the deed is in substance, and not in mere form, a deed of gift. The Matale case reported in the *Legal Miscellany* for 1865 p. 78, is not an authority on this point. The issue was whether the deed of gift was valid without a clause of disinherison. One of the Judges suggested that the husband was his predeceased wife's heir, but no one seems to have raised the question whether the gift lapsed on her death. Perhaps the terms of the deed excluded that. The chief difficulty I feel in expressing an opinion which may be applicable to other cases is that deeds of gift are often virtually wills.

executed on death bed, where there is no expectation of further assistance, and no intention by the grantor that the deed shall take effect before his death. I am not sure whether in such a case the rule I have spoken of would with propriety be adopted. Imagine the case that in some time of epidemic a father and several of his family were ill, and he (or the notary) preferred to grant to his children several deeds of gift on the narration of assistance rendered and to be rendered, rather than one testament and that one of his family predeceased him by a few hours leaving children. I should hesitate in such a case to say that the gift had fallen, and was not available for the predeceased children, because I should presume that it was not the donor's intention that it should so fall, not being a personal legacy or one burdened with real conditions. In the present case, the deed seems to be really a deed of gift for assistance, and that the gift fell on the predecease of the grantor's wife. I do not feel much difficulty from the clause "and when I am not, the said *gampanguwa* the said two persons Sarangee and Dotee or their descendants and heirs whomsoever are hereby empowered to possess uninterruptedly for ever as they may please," because I do not read this as a substitution of heirs of a donee who should happen to predecease. I read it as shewing that after the donor's death the gift was of the fee of the property and not of a mere life-rent."

The plaintiff appealed on the grounds:—1. That on a careful perusal of the deed which was not revoked by the donor, it would appear that a half share of the lands was granted to Sarangee in consideration of assistance that had been rendered for a period of 20 years anterior to the date of that deed, and for assistance to be rendered. 2. That the grant was not personal to Sarangee, but was a grant to her, her descendants, and heirs; and the appellant was therefore entitled to judgment in terms of the deed for a half share of the said lands claimed by him, inasmuch as the donor by non-revocation of the deed, clearly intended that the provision therein should be fully carried out.

In appeal *set aside* and case sent back for further hearing, in the following terms: (*Per R. Cayley, J.*)

The plaintiff claims under a deed of gift executed in his mother's favour by her second husband. The District Judge has dismissed the plaintiff's action on the ground that the donation became inoperative by reason of the donee's death in the donor's life-time. The grant,

which is in fovour of the donor's wife, and his daughter, the first defendant, is expressed to be made in consideration of past assistance and of affection, and also for the purpose of obtaining future assistance and securing for the donor (after his death) proper funeral rites and ceremonies. It is recited that the wife had rendered assistance to the donor for 20 years, all recompense for which would be lost to her family if the deed became inoperative by reason of her death in the donor's lifetime; but we can find no authority in Kandyan law in support of this position. Whether or not the donor had power to revoke a deed of this kind, it is not necessary to determine; for, though he lived three years after his wife's death, he never attempted to exercise such power. The gift does not appear to us to fall precisely under any of the cases mentioned in *Perera's Armour*, p. 91, where circumstances under which a revocable deed becomes null and void are set forth, and we are not disposed, without express authority, to press the operation of Kandyan law any further in this direction, particularly in cases where the donor himself does not appear to have intended any revocation of the benefit which he expressly conferred upon his wife and her heirs and descendants. The case is sent back for further hearing, in order to ascertain to what precisely the plaintiff is entitled. The deed of gift grants certain property to the plaintiff's mother and the first defendant jointly; but the plaintiff in his libel claims specific portions of some of the lands. (2nd July, 1875).—*Bev. & Sieb. Rep.* pp. 15-18.

See also D.C. Kandy 61706.

Deed though revoked by donor after donee's death, when irrevocable.

4. *D. C. Kandy*, No. 30472.—The plaintiff gifted certain lands to his son Caloonda, who died 15 years before action brought. The defendants, his widow and children, remained in possession of the lands. The plaintiff, shortly before action brought, revoked the deed. The questions for decision were, first, whether the deed was revocable, and, second, whether the defendants had not prescribed against plaintiff. The following is the judgment of *Smedley, D. J.* In this case the donee is admitted to have been dead for about 15 years, so that since his death prescription would in all ordinary cases have run in favour of defendants, and even with respect to Kandyan deeds of gift, which as a general rule are revocable during the life of the donee, I have strong doubts, whether in such a case as the present, the claim would not be prescribed. But it does not seem necessary to go into the question of prescription in this case, for I have no doubt that according to Kandyan law the deed in question is not a revocable deed.

The deed itself sets forth that the plaintiff gifted the lands to his son, under whom the defendants claim, in consequence of his having "proved himself most obedient and dutiful." In plaintiff's examination on 4th January 1857 before issue was joined, and which must therefore be taken as part of the pleadings, the plaintiff explains the circumstances under which he was induced to make this to his dutiful and obedient son in the following words :—

"I gave these lands to him because I contracted a second marriage." It seems to me that this explanation in no way alters the consideration as set forth in the bond. It only goes to say,—"My son being dutiful and obedient, I gave the lands to him, as I was about to contract, or had contracted, a second marriage." The consideration still remains dutiful conduct and obedience; but the *reason* why at that particular time this gift was made, is explained by the plaintiff in his examination. The Kandyan law says—"If a married man, having resolved to contract a second marriage, thought proper to provide for the mainteoance of his wife and child, or adopted child, and did accordingly, previous to the second marriage, execute a deed transferring thereby a portion of his lands to the said wife and child, such deed shall be irrevocable."* It is true that the plaintiff in his examination also says, I cannot say whether I gave the transfer before or after the second marriage; but this is not material, for it is clear that it was about the time, and in consequence of the second marriage, either contracted or about to be contracted: and looking to the nature of Kandyan marriages, the mere conducting of a woman to a man's house in *diga*, or the man going to live in the woman's house in *bina*, if the man himself is unable to state whether a certain act of his own was done before or after the marriage, it is scarcely within the range of possibility that reliable evidence could be adduced to fix the precise date; but under any circumstances it would be proof for the plaintiff to adduce, and not for defendants. I am therefore of opinion that the deed upon which the defendants found their right is an irrevocable deed, and plaintiff is nonsuited with costs.

In appeal *affirmed* (29th October, 1861).—*Bev. & Sieb. Rep. pp.* 114-116.

Talpot Deed when admits of proof.

5. *D. C. Kandy*, No. 19487.—In this case the District Court considered that defendant was not entitled to go into proof of a talpot dated June 1836, filed by him

* *Perera's Armour*, p. 96.

with his answer as his title to the lands in claim, inasmuch as the same was not notarial, and therefore invalid under the provisions of the 2nd clause of the Ordinance No. 7 of 1840, which was in force at the time of its alleged execution. On appeal the judgment of the Court below was set aside and the case remanded for hearing, the Supreme Court being of opinion that it was open for the defendant to prove his talpot valid under the 7th clause of the Ordinance (31st March, 1855.)—*Bev. & Sieb. Rep. p.* 5.

Section 9.

(From the Legal Miscellany.)

1. All Deeds of Gift except to priests, whether conditional or unconditional, revocable during the donor's life-time.—2. Deed of Gift from husband to wife for a moiety of his estate, irrevocable after his death.—3. Clause of disinherison not indispensable where a portion of the estate is only gifted away.—4. Deed of gift from husband to wife requires no clause of disinherison.

All Deeds of Gift except to priests, whether conditional or unconditional, revocable during the donor's life-time.

1. *Matala, D. C.* No. 4271.—The grants filed appear to this Court to be Kandyan Deeds of Gift, which, excepting those made to Priests, whether conditional or unconditional, are (like Wills) always revocable by the donor in his life time, and are often made in contemplation of death; but such grants differ essentially from Last Wills or Testaments in respect to their transferring an immediate title or interest to the donee in the property thereby granted: whereas a Will does not take effect until the death of the Testator. Until proof on both sides has been gone into as to the execution of these Grants, and it be shewn whether they were delivered or not to the donee, and whether the donees were put into the immediate possession of the land granted thereby, this Court cannot, in the present stage of the suit, give any definite opinion as to what is the legal effect of these deeds.—(C) *August* 20, 1844.—*Leg. Mis. p.* 373.

Ratnapura, D. C. No. 8142.—It is impossible to reconcile all the decisions as to the revocability or non-revocability of Kandyan deeds; but the Supreme Court thinks it clear that the general rule is, that such deeds are revocable, and also that before a particular deed is held to be exceptional to this rule, it should be shown that the circumstances which constitute non-revocability

appear most clearly on the face of the deed itself. The words in the present deed as to services "continued to be rendered by the donee" do not appear to the Supreme Court to be sufficiently clear and strong. (July 10, 1866).—*Leg. Mis. pp.* 45, 46.

Deed of Gift from husband to wife for a moiety of his estate, irrevocable after his death.

2. *Colombo, D. C.* No. 10164.—Plaintiff's claim to the moiety, which is proved to have belonged to her late husband, is also supported by the Deed of Gift from him, which was voidable in his life; but as he has died without any revocation of it, the gift can be sustained. See Burge, 275. Grotius Int. 1. c. 2, s. 6, p. 284. *V. D. Linden*, 214.

The objection to the want of stamp is waived; and the 8th clause of the Ord. No. 21 of 1844 cannot apply to the plaintiff's claim under the Deed of Gift, because, upon it, her right has not accrued as devisee, heir-at-law, or as executrix or administratrix.—(C.) *November* 1852. *Leg. Mis. p.* 447.

Clause of disinherison not indispensable where a portion of the estate is only gifted away.

3. *Kandy, D. C.* No. 37916.—This case seems to us to fall within the principle of *District Court of Kandy No. 33279, decided by the Supreme Court on the 3rd December 1863.*

It was there laid down. that a clause of disinherison was not indispensable where the deed gives away a portion only of the donor's property; and we think that it appears from the facts before us that a portion only of the donor's property was given in this case. And judgment entered for the defendant and appellant. *Creasy, C. J.,* and *Temple, J.* October 30, 1866.—*Leg. Mis. pp.* 74, 75.

Deed of gift from husband to wife requires no clause of disinherison.

4. *Matala C. R.* No. 1955.—In this case a Kandyan gifted his lands to his wife, and after the wife's death her son by a former marriage sold the land to Plaintiff. The defendant and nephew of the second husband disputed the deed on the ground that it contained no clause of disinherison.

The Commissioner (*De Saram*) held the deed invalid for want of the clause of disinherison.

In appeal, *Ferdinands* for appellant. A gift from a husband to his wife, whereby the party disinherited is not a child of the donor, comes within the exception of the rule, and does not require a clause of disinherison. *Armour p.* 104 *Sec.* 12.*

[*Temple, J.* The donee in this case having predeceased the donor, did not the acquired landed property of the wife descend to the husband, as in the case of moveables?]

* *Perera's Edition.*

Ferdinands.—The wife's acquired *landed* property descends to her children in preference to her husband.

*Marshall p. 339 Sec. 81. Armour pp. 15 and 26.**

Judgment set aside, and judgment entered for plaintiff for the land in question, together with costs of suit. There was no necessity for the clause of disinherison in the deed in favor of Kalu Menica, she being the wife of Gamarale.

See *Armour p. 179,* and *Perera's Armour p. 104. (Creasy, C.J.; Temple, J.* and *Stewart, J.) November 15, 1866. Leg. Mis. pp. 78, 79.*

SECTION 10.

(*From Lorenz's Appeal Reports.*)

1. A Kandyan Deed of Gift though containing a clause renouncing the right of revocation, revocable.—2. A Kandyan Deed of Gift in consideration of past and future services, with a renunciation of the right of revocation, is irrevocable.

A Kandyan Deed of Gift though containing a clause renouncing the right of revocation, revocable.

1. *Kandy, D. C.* No. 29890.—In this case the plaintiff stated in her Libel that she, on the 6th September 1854, by Deed of Gift, transferred certain lands to the defendant (being her beena-married husband); which deed she afterwards, on the 25th April, 1856, wholly revoked. The defendant in his Answer pleaded that the plaintiff had by the same deed of the 6th September 1854, renounced her right of revoking the gift, as well as her right by Kandyan Law "to alter, cancel or break" the same; and that the deed with the knowledge of the plaintiff had been deposited in the Cutcherry for his debt.

On the 26th November 1857, before *T. O. Power, A. D. J.; Vanderwall* for the plaintiff submitted that upon the pleadings, and according to the Kandyan Law, the plaintiff was entitled to judgment. *Ferdinands,* Proctor for the defendant, urged that the Kandyan Law being silent on the question raised in the present case, recourse must be had to the Civil Law; and that the deed, containing, as it did, a clause by which the donor renounced all right to revoke the gift, must be held to be an irrevocable instrument.

The judgment of the Court below was as follows:—

"The Court is of opinion that the Kandyan Law is not silent as regards the question now raised, and re-

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* *Perera's Edition.*

course must not therefore be had to the Civil Law to determine it. The Kandyan Law is that "all Deeds of Gift, except those made to Priests and Temples, whether conditional or unconditional, are revocable by the donor in his life time." *Armour*, p. 179 *. It is true that there are exceptions to this rule, and some deeds, other than those to Priests and Temples, are irrevocable; but the exceptions are expressly mentioned by *Armour*, pp. 180-181; † and the deed of the 6th September 1854 cannot be considered as forming an exception, it being simply a deed of gift from a wife to her beena-married husband, which she has the power of revoking whenever she may think fit. The Court considers that the plaintiff is entitled to judgment; and it is decreed that the plaintiff be entitled to, and quieted in the possession of, the lands in the Libel mentioned; and that defendant do pay costs of suit."

Against this decision the defendant took the present appeal.

Morgan, Q.A. (*Lorenz* with him) for the defendant and appellant. The District Judge holds that all deeds of gift in Kandy, whether "conditional or unconditional," are revocable. But if the clause of renunciation was valid, the plaintiff could not revoke. A person may renounce any right which the law allows him to exercise. [STERLING, J. A power of Attorney is revocable, unless coupled with an interest.] That goes upon a different principle. Here, by the Kandyan Law, certain deeds of gifts are revocable: that is, the law allows a donor the right of revoking a deed of gift, if so inclined; but here the donor by express convention renounces the right. The Kandyan Law is silent as to the effect of renunciation. Now the right of revocation is a right introduced for the benefit of the donor; nothing can *compel* him to revoke. In all cases of benefit by the Dutch Law, the party intended to be benefited may renounce. So in English Law, notice of dishonour may be waived [Sterling, J. A wife may renounce her right to dower or thirds.] See also V. d. Keessel's *Thes.* 264, 2 Burge, 147. A debtor may renounce the *beneficium non numeratæ pecuniæ*; sureties the *beneficia ordinis, divisionis et excussionis*; and all on the well-known principle *Unicuique licet juri pro se introducto renunciare* 1 Pothier, 263; Chitty on *Contracts*, 570; Phillimore on *Jurisprudence*, 57; 1 Burge, 234. So suitors may

* The citations from *Armour* are from the first edition.— Now see *Perera's Armour* p. 90.

† See *Perera's Edition*, pp. 90-93,

agree to give up their remedy in Court of Law by a reference to arbitration. It may be different in the case of a public or general law, which is binding on all, and cannot therefore be avoided; but the present is a private right, not a public law. *Armour* says "in certain cases" you cannot revoke. [TEMPLE, J. referred to pp. 179, 180.]* In all cases, whether of assistance to be rendered or not, and whether the assistance *has been* rendered or not, the deed is revocable; but where the clause renouncing revocation is superadded, the deed is irrevocable; clearly showing that it is the renunciation clause, and that alone, which renders a deed revocable.

Rust, (*Vanderwall* with him), *contra*. We have to deal with exceptional cases. This is a voluntary conveyance. Till 1821 even an absolute sale was revocable. As to the clause of renunciation, it has been decided in No. 25,217, *D. C. Kandy* (8th June 1855), that it does not take away the donor's right of revoking. See also No. 23,886, *D. C. Kandy* (12th September 1851). The words there were "neither I nor any of my descendants can dispute the said gift either by word or deed, and the said donee can possess as parveny property." In No. 28,626, *D. C. Kandy* (5th August 1857) the words were "absolute gift—in future neither I nor my descendants shall make any dispute in word or deed, but it shall be possessed in parveny possession." The question of renunciation was expressly raised in the Petition of Appeal; yet the deed was held revocable. See also No. 19,064, *D. C. Kandy* (12th March 1846).

[TEMPLE, J., cited No. 14,253 *D. C. Badulla* (5th July 1854); and No. 4,271 *D. C. Matale* (20th August 1854)].

Morgan in reply. In 19,064, the words are "in parveny, and neither I myself, nor my descendants, shall dispute, and even if such dispute be made, it shall not avail." This is the ordinary clause in all Deeds of Transfer in this country, and imply no renunciation of the right of revocation. But the words in the present case contain an express renunciation. Besides the clause that "I shall not dispute," there is a clause that "I shall not break or cancel." A dispute does not amount to a cancellation. In none of the other deeds now produced does a clause similiar to the one in our deed occur; in none of them is there a word about "cancelling or breaking." In 19,064 the right to renounce

* See *Perera's Armour* pp. 90-95.

was not brought into question. In 28,626 the District Court did not put it on the ground in question; on the contrary the District Judge says, "there is no clause in the Deed barring the right of revocation, but only the usual Kandyan form of renunciation of right," viz. "that neither I nor my descendants shall make any dispute; that the donee may from generation to generation possess for ever in undisturbed parveny, doing whatsoever he pleases." *Armour* is only a collection of cases; but as the cases are put by him, they support our position. All gifts are revocable, whether given for consideration or not. The only question is, whether the donor has barred himself from revoking.

Sed per Curiam. The judgment of the Court below is *affirmed.—Lorenz's Rep.* 1858 *Part III. pp* 24. 25.

A Kandyan Deed of Gift in consideration of past and future services, with a renunciation of the right of revocation, is irrevocable.

2. *Kurunegala D. C.* No. 13,801.—*Libel*:—That the plaintiff, being seized of certain lands, did in 1848, when about to join her second husband in the Seven Korles, deliver the lands to the defendant on a deed, to be taken care of, and the produce to be accounted for to the plaintiff;—that she has since discovered that the deed was a deed of gift, though at the time of its execution the plaintiff did not so understand it. *Prayer*,—that the defendant be ejected, &c.

Answer:—That the deed was a deed of gift, and the defendant possessed the lands thereunder, and was and is ready to perform the conditions thereof.

Replication:—That the plaintiff was deceived into signing the said deed and being now dissatisfied therewith, it should be declared void.

[The deed in question, after reciting that the donor (plaintiff) had received assistance for three years past from the defendant (her only son), that he had paid a certain debt of her's, and that the plaintiff expected future assistance from him, gave the lands to the defendant "to be possessed finally, as parveny-property," and provided "that if the donor should happen to leave him, not being satisfied, he should (for the abovementioned consideration, and for the future services also, calculated at 9d. a day), finally hold the said lands."]

On argument at the trial, no evidence being called on the part of the plaintiff to prove the alleged deceit, the Court below pronounced in favour of the deed as a deed of gift, and gave judgment for the plaintiff.

On appeal by the defendant,

Dias for the appellant. The rule has never been questioned, that a Kandyan deed of gift for assistance

is revocable; even where the donor has expressly renounced the right of revoking it. No. 29,890, *D. C. Kandy* * [STERLING, J. In that deed there was no mention of future services.] The present deed assesses the value of the future services, evidently in view of a revocation, should the donor choose to exercise her common-law right. [TEMPLE, J. The words of the deed seem to amount to a waiver of the right of revoking. STERLING, J. The intention of non-revocation is clearly expressed.] *Marshall's Dig.* 320; *No.* 24,318, *D. C. Kandy, 31st July* 1854; *No.* 14,253, *D. C. Badulla.*

Lorenz for the respondent, was not called upon.

[TEMPLE, J. The case falls directly within the rule laid down by *Armour p.* 180.† Put an extreme case, of a large sum of money paid by the donee on the faith of the gift. Can the donor, in the teeth of the clause depriving herself of the right of revocation, take back the lands?]—*Lor. Rep.* 1858-1859. *Part III. pp.* 76-77.

SECTION 11.

(*From Rama Nathan's Appeal Reports.*)

1. In a Kandyan Deed of Gift the disinheriting clause is not absolutely necessary, if the intention of the donor is clear. —2. Clause of disinherison is necessary to disinherit the legal heir.

In a Kandyan Deed of Gift the disinheriting clause is not absolutely necessary, if the intention of the donor is clear.

1. *Ratnapura, D. C.* No. 10,690.—Plaintiff, by right of inheritance from his father and by prescription, claimed certain lands which the defendants were alleged to hold forcible possession of.

Defendants denied that plaintiff was *Setuwa's* son, or that he ever held his shares, and further stated that the said *Setuwa* left no issue by his wife *Ukku*, to whom he gifted by deed all his shares to the land in question, and that she adopted the defendants, and they pleaded prescriptive possession.

Plaintiffs joined issue on the question of paternity and adoption, and avoided the deed of gift referred to in the answer of the defendants, by contending that, as there was no special clause in it disinheriting him, nothing therein should affect his right.

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* See *ante*, p. 83.

† *Perera's Edition, pp.* 90-93.

On evidence, it appeared that defendants were *Ukku's* nieces, whom she adopted, with no ceremony whatever, but simply took charge of them and brought them up. Plaintiff clearly proved that he was *Situwa's* son by his first wife *Dingiri*. The deed of gift recited "nether I, nor my heirs, executors &c. or any other person whomsoever shall in future dispute the validity of this gift."

The District Judge (*De Livera*) dismissed plaintiff's claim, holding that the deed in question was valid as against the plaintiff, although he was not expressly declared to be disinherited, and cited *Perera's Armour*, Ch. 6 sec. 7 and 12.—(*pp*. 96. 104.)

On appeal *Grenier* appeared for appellant, *Layard* for respondent.

Cur. adv. vult.

The *Supreme Court* held as follows :—

Affirmed.—Plaintiff claims the land in question as of inheritance from his father *Setuwa*, who in his libel he alleges to have died about twenty years before suit.

Defendants have traversed the paternity. On this point the District Judge's judgment proceeds on an assumption that plaintiff is the son of *Setuwa*, but in the view we take of the case, it is unnecessary that we should proceed upon that issue.

After plaintiff's birth, *Setuwa* married *Ukku* and executed a deed in her favour, the execution of which was admitted, and which, if valid at all, took effect as a deed disinheriting *Setuwa's* heirs. By this deed *Setuwa* gifted to *Ukku*, "with the view of receiving from her future aid and assistance until my death," his land of paternal inheritance, adding "all these aforesaid lands &c. have been hereby gifted to the said *Ukku*, consequently neither I nor my heirs, executors, administrators or assigns or any other person whomsoever shall in future dispute the validity of the gift."

Ukku died about six or eight years ago, and defendants, who appear to have been in possession since her death, allege that they were adopted by her. The adoption is traversed by plaintiff, but in the view we take of the case, it will not be necessary for us to decide that issue.

From the clause last cited in the deed in question, it is evident that the deed was intended to disinherit the heirs of the donor, and the consideration of the disinheriting gift away from them is expressed to be the executory condition of receiving future aid from the donee till death.

We think, upon the balance of authorities cited by Sir Charles Marshall, that a deed in these terms is valid, subject, as in the *Kurunegala* case cited at p. 316 of Sir C. Marshall's book, to an onus on the donee of proving fulfilment of the condition. And if this action had been brought by plaintiffs upon *Setuwa's* death, we should have been prepared to hold that upon plaintiff's antagonist lay the burden of proving that the condition had been fulfilled down to *Setuwa's* death. But plaintiff's conduct in lying by all these years since *Setuwa's* death materially alters the position of the matter. Plaintiff admits that he has been out of possession since *Setuwa's* death. For some 14 years during *Ukku's* widowhood, and for some six or eight years since, plaintiff has lain by and allowed others to enjoy these lands under the deed, the validity of which he now contests. And he only comes forward six or eight years after *Ukku's* death, when it would be very probably difficult for those claiming under her to prove affirmatively by direct evidence that *Ukku* had rendered *Setuwa* the necessary assistance stipulated for until his death. We consider this as raising a strong presumption that *Ukku* did render that assistance, and that she could have been able to prove it, had plaintiff brought his action at *Setuwa's* death, when, if the deed passed nothing to *Ukku*, plaintiff's right became assertible.

For these reasons the D. J.'s decision is affirmed with costs.—*Rama Nath: Rep.* 1877. pp. 195, 196.

(*Present :—Creasy, C. J, and Temple, J.*)

Clause of disinherison is necessary to disinherit the legal heir.

2. *Kandy D. C. No.* 34395.—Plaintiffs, as issue of one Siam Banda Coralle by his first wife, sued defendant, his widow, for an undivided moiety of certain lands

Defendant denied the claim of the plaintiffs and pleaded a paper writing or "deed of inheritance," dated 22nd August 1860, whereby her husband, Siam Banda Coralle, "made over and granted in praveney" to the defendant and her minor children the lands in question.

The plaintiffs demurred to this answer as insufficient, in that the paper writing pleaded did not (as was essential, under the Kandyan Law) contain a clause of disinherison in respect of plaintiff's share of inheritance.

The deed ran as follows :—

Know all men by these presents. Purport of a deed of inheritance caused to be written and granted by me E. W. R. Siam Banda Coralle late of .... and now residing at Hulongamowa in the Kohensea Pattu of

Matela in the Central Province of the Island of Ceylon, is as follows :—

That the field called &c., [names and boundaries of several lands being set out, the deed proceeded] : these said high and low lands, houses, gardens and plantations, I the above named E. W R Siam Banda Coralle have made over and granted in paraveny to my wife M. Palingo Menika of &c., and to my begotten children (duly named) : to these six persons, with my good will and pleasure.

That henceforth my said M. Palingo Menika and my said five children (duly named) shall render me every assistance during my life-time; and after my death all the said high and low lands, houses, gardens and plantations, my said wife Palingo Manika, Loku Banda, Calloo Banda, Punchi Banda Muttoo Banda and Bandara Menika: these six persons and their descendants, assigns and heirs and every of them are empowered to possess for ever, and do whatever they may please, and they are hereby made over; and further from this day forth, none of the heirs, administrators and executors of the estate of me, the said Siam Banda Coralle, shall have any power of title to the said high and low lands, houses, gardens and plantations or any of them ; and I have hereby covenanted that I have not hitherto done any act whatsoever whereby this deed of inheritance shall be cancelled ; and for a deed in that behalf, I the said E. W. R. Siam Banda Coralle have set my signature &c.

The learned District Judge (Smedley) held that the document purported to be a testamentary disposition, and as such was governed by Ord. No 21 of 1844, cl. 1. He was therefore of opinion that a clause of disinherison was unnecessary; he accordingly over-ruled the demurrer.

On appeal, the Supreme Court set aside the order, and entered up judgment, on the demurrer, for the plaintiff, in these terms:—

The Supreme Court is clearly of opinion that the instrument under which the defendant claims is a deed of alienation, and not a last will and testament.

The case comes within the authority of D. C. Kandy, 27150,* which the Supreme Court considers to

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* The facts of this case, as yet unreported, are these :—

D. C. Kandy No. 27150. { Indejoti Unanse vs. Keerale.

Plaintiff sued in ejectment, claiming the lands in question under a deed, dated 1st May 1848, which was worded as follows :—

"Purport of a deed of paraveny, caused to be written and

have been rightly determined and to be conclusive in plaintiff's favour.—*Rama Nath: Rep.* for 186', page 108.

Section 12.

(*From the Supreme Court Circular.*)

1. Deed of Gift in consideration of past payment, or advance of money lent, irrevocable under Kandyan Law.—2. If Deed revoked, donee entitled to compensation for improvements made by him on the land.

Present:—Phear C J. and Dias J.
(September 6. 1863.)

1. *Kandy D. C.* No. 70480.—The plaintiff in this case claimed certain lands by virtue of deed of gift from one Appuwa. It was dated 23rd December, 1872, and the consideration mentioned therein ran as follows:—

Deed of Gift in consideration of past payment, or advance, of money lent irrevocable under Kandyan Law.

"I &c., being now old and sick, besides as I have no children begotten to me, nor a wife or wives, and be-

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granted at Kandy on 1st May 1848, is as follows,—

"I the undersigned Punchiralle &c., do hereby declare that my paraveny property inherited to me from my father Dingiralla and possessed since the last 50 years without dispute, and situate in &c., have been transferred and made over to my younger brother by relationship called Indejoti Unanse, for the purpose of obtaining assistance to myself and my wife Suberat Ettena, as both of us have no children, and entered into the following agreement, to wit, that no dispute whatever can be made in future against this by any of my descendants, either by word or deed, and that the said Indejoti Unanse shall during our mutual life render us satisfactory assistance, and after our death to inter our dead bodies duly according to the customs of the country, and perform all that is necessary as religious rites for the sake of the other world. That from this day forward, the said Indejoti Unanse and his assigns shall possess the whole of the said lands in undisturbed paraveny possession for ever, doing whatever they please with the same &c."

Defendant pleaded in effect that he was the son of Punchirale, and as such was entitled by inheritance to the lands in suit.

The District Judge found defendant to be the admitted heir-at-law of Punchirale, and that under the collective decision of the Supreme Court in D. C. Kandy 4204-21312 it was absolutely necessary, in order to render valid a revocable deed of the nature put forward by plaintiff, that an express clause of disinherison should exist. The District Judge therefore dismissed plaintiff's case.

On appeal, the Supreme Court set aside the judgment of the Court below and referred the case back to it, ordering special jurors to be summoned and with their assistance, to find,

sides as none of my relatives render me any assistance excepting my brother-in-law, Heneya, who taking into consideration my poverty and weakness has rendered me every necessary assistance for some years past, and besides as I heretofore borrowed 100 rupees from him, the said Heneya, and paid my debts, and redeemed my lands, and as I have no sufficient lands to maintain myself, for all these several reasons, and with the view of obtaining assistance for the future, I do hereby of my, free will and consent gift and make over to the said, Heneya &c."

It appeared that Appuwa had revoked this deed by another deed dated 18th September, 1874, for the following reasons as were therein stated,—

* * Because the said Heneya did not, since the date of the said deed of gift and up to this time, render me any assistance whatever as required therein, as he paid no attention or regard to me, and greatly ill-treated me, and further because he did not give me or pay my debtor a sum of 100 rupees, which he therein agreed and undertook to pay, &c.

And the said Appuwa granted to the defendants a deed of gift of even date with the above deed of revo-

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"1. Whether according to Kandyan Law, a deed such as is put forward by plaintiff ought to contain an express clause of disinherison, and if so, in what specific terms.

"2. Whether if such a clause be requisite, the deed ought to set forth the reason for such disinherison.

"3. To what degrees of affinity to grantor, such requirements would extend.

"4. To specify in what Districts of the Kandyan Provinces such law prevails."

And the Supreme Court ordered the District Court to give judgment accordingly (19th November 1856.)

Special assessors being summoned by the District Court as ordered, they were unanimously of opinion,

"1. That in order that a deed such as the one in question may be valid, it must contain a clause of disinherison.

"2. That such a deed should set forth the reasons of disinherison, such as failure to render assistance, undutiful conduct, ill-treatment, or generally such conduct as is displeasing to the parent.

"3. That such requirements extend as respects all persons who are the lawful heirs of the proprietor, no matter how near or distant may be their affinity to him.

"4. That this law or custom, so far as their knowledge extends, applies to the whole of the Kandyan country."

Accordingly the District Judge found as follows :—

"Thus the assessors, three of the highest and most intelligent and experienced of the Kandyan chiefs, agree entirely with the law laid down in my original judgment, which must therefore stand." (16th June 1857.)

cation, conveying the lands he had originally gifted to plaintiff.

The learned District Judge was of opinion that the grantor had under the Kandyan law a right to revoke such a deed as was relied upon by the plaintiff and accordingly dismissed his case.

On appeal, the Supreme Court, by the following judgment delivered by Phear, C.J., set aside the judgment of the Court below in these terms:—

We think it very plain that the deed A, upon which the plaintiff relies as his ground of title, was a conveyance to him from the owner for a valuable consideration, of a very substantial character. No doubt it was at the time a past consideration; but it was none the less a valuable consideration.

Indeed, it is quite easy to perceive that unless it be so considered, and unless the plaintiff is allowed to hold the property conveyed to him as the equivalent of, or satisfaction for, or at least as security for, that past expenditure and advance of money lent for the benefit of this donor, which the deed purported to be given in consideration of, he may have now lost all means of recovering the money so lent. The District Judge says in a note, which he has added to his judgment, that he looks upon the statement of consideration in the deed as nothing more than an attempt, and an unsuccessful attempt, to disguise the true nature of the deed; but the person who is thus supposed to disguise the nature of the deed is the maker of the deed himself. Surely, as against him, and volunteers under him, the deed must be taken to have that character, which he, the maker, desired to give to it, and which as against them there is the strongest possible evidence that it did actually possess, namely, the recital in the deed itself, unrebutted by anything to the contrary.

We need hardly add that counter statements made by the same person in the defendant's deed, after he had parted with the property, and for the purpose of justifying his dealing with it again notwithstanding, are not admissible, and indeed could be of no value as evidence for the defendants.

It seems to us that the District Court was in error in holding that the deed was a revocable deed; and we think that the plaintiff has established the claim which he makes in the libel.—*Sup. Court Cir.* 1878. Vol. 1. pp. 47, 48.

Present :—Cayley, C.J.—Dias and Berwick, JJ.

(November 28, 1879.)

If Deed revoked, donee entitled to compensation

2. *Kandy D. C. No. 79726.—Where the plaintiffs were put into possession of a portion of land, in the Kandyan Provinces, by the owner under a deed of gift, and whilst in possession they brought it into cultivation and permanently improved it and increased its value: and subsequently the original owner revoked the deed of gift and ejected the plaintiffs from the said land.*

Held, by Cayley, C. J., and Dias, J., that (1) the plaintiffs, the donees under the revoked deed, were entitled to compensation for the permanent improvements made by them: and that as no objection was taken to the form of action, either in the answer or in the court below, they were entitled to recover this compensation by the present proceedings, which were in the form of an actio in personam.

Held, also by the Collective court that they were entitled to this compensation without any deduction for profits received by them during their occupation.

Held, by Berwick, J., that they were entitled to this compensation, and to recover it by a personal action both under the Roman-Dutch Common Law and also by the Kandyan law.

Held, further, by Berwick, J., that under the Roman-Dutch Law every possessor without title, is entitled where ejected by the true owner to compensation for useful improvements made by him, and may recover this not only by retention of the land till he has recouped himself for this from the rents and profits; but also by a personal action. And further, that if the possession has been parted with or lawfully lost, his only means of recovering compensation for improvements is by action.

The plaintiffs in their libel alleged that the defendant, by a deed of gift dated 20th May, 1871, granted, and transferred to the plaintiffs certain lands at Dimbula Udagama. That the plaintiffs entered into possession of the said land and permanently improved the same, so that its value has been enhanced by 1500 rupees.

Complaint—that during the coffee season of 1877-78 the defendant took forcible possession of the said land, and did pluck and remove the coffee thereon.

The plaintiffs' prayer was an alternative one; that they should be either put in possession of the land, or if declared not entitled to the land, that they should be

awarded 1,500 rupees as compensation for the permanent improvements effected by them during their possession of the land.

The defendant, in his answer, admitted that the plaintiffs had entered upon the land under the deed of gift referred to in the libel, and that the land had been cultivated and improved by them; but set up his right to revoke the deed of gift, and to re-take possession of the land, and alleged that the plaintiffs had been amply compensated for the improvements effected by them by the produce which they had realized.

At the trial the District Judge held that the defendant was entitled to revoke the deed of gift and retake possession of the land; but that the plaintiffs were entitled to compensation for the permanent improvements effected by them, and assessed this compensation at the sum of 600 rupees.

Evidence had been called at the trial, but there was no evidence recorded to shew on what basis the District Judge had made his assessment.

From this judgment the defendant appealed.

On appeal *VanLangenberg* appeared for the plaintiffs and respondents.

Cur. adv. vult.

On the 23rd January the following judgments were delivered.

The judgment of Cayley, C.J., and Dias, J., by

Cayley, C.J.—In this case the plaintiffs, who are the donees of a hena situated in the Kandyan provinces under a deed of gift executed in their favour by the defendant, allege in their libel that they entered into possession and permanently improved the same, so that it has increased in value to the extent of 1,500 rupees, and they complain that they have been ejected by the defendant, whereby they have sustained damage to the extent of 600 rupees. They then, in effect pray either that they may be declared entitled to and be restored to the possession of the land, or, if not, that the defendant may be decreed to pay to them the sum of 1,500 rupees for the value of the improvements; they also pray that they may be restored to the possession of the land, until this sum be paid, and that the defendant may further be condemned to pay to them 600 rupees by way of damages and further mesne profits at the rate of 600 rupees per annum, so long as the defendant remains in possession of the land. The de-

fendant in his answer takes no objection to the form of the plaintiffs' action, but pleads, (1) that he resumed possession of the lands, because of the ingratitude of the plaintiffs; by which we presume he intended to plead a revocation of the deed of gift; and (2) that the plaintiffs did not expend as much as 1,500 rupees in the improvement of the land, and that they had recouped themselves for their expenditure by the profits which they had derived from this and other lands which had been granted to them under the same donation.

The District Judge has decided that the plaintiffs are not entitled to recover possession of the land, but are entitled to compensation for the amount expended by them in permanent improvements, and this sum he has assessed at 600 rupees, for which he gives the plaintiffs judgment.

The plaintiffs do not appeal, so that no question arises now as to their right to be restored to possession of the land. The defendant has appealed on the ground that the amount decreed against him is excessive, and that from the cost of the improvements the value of the rent and profits of the land received by the plaintiffs should be deducted. As we have observed above, no objection was taken in the answer, nor is any objection taken in the petition of appeal as to the form of action, so that no question as to the plaintiffs' right to sue for the value of these permanent improvements, after they have lost their lien by losing possession of the land, appears to us to arise; for as no question as to the plaintiffs' right to sue has been raised by the defendant's answer, we do not think that this question can fairly now be raised; for, if this point had been raised in the pleadings and decided against the plaintiffs, the plaintiffs would probably have appealed against the part of the judgment, which decides that they are not entitled to be restored to the possession of the lands from which they had been ejected *vi et armis*.

The only questions, therefore, that appear to me to come before us for adjudication are, (1) what has been the amount expended by the plaintiffs in profitable and permanent improvements; and (2) whether in fixing the amount payable by the defendant there should be a deduction of the value of the profits received by the plaintiffs from the land. With regard to the first question, it appears to us that the case must go back for a further hearing unless the parties can agree upon some sum. It appears that about six acres of jungle and patna have been converted into a profitable coffee gar-

den, and there should be no difficulty in arriving at a fair estimate of the probable cost of such conversion. With regard to the second question, we may observe that we have had the advantage of perusing the judgment about to be delivered by Mr. Justice Berwick, and that we fully concur with him in thinking that the plaintiffs, so long as their deed of gift remained unrevoked, must be treated as owners of the land with a good, though a defeasible title, and that during such ownership they had a right to enjoy the rents and profits, and cannot, after the revocation of the deed, be called upon to account for them.

We accordingly think that the judgment of the District Court should be set aside, and the case sent back for further hearing to ascertain how much the plaintiffs have expended in permanently improving the land; for this amount (not exceeding 600 rupees) without any deduction for profits received by them, they will be entitled to judgment, which will be entered up for them accordingly. The costs in the appeal will be costs in the cause and will stand over, pending the final decision of the case.

Berwick, J.—In this case, one arising in the Kandyan provinces, the defendant has appealed against the amount decreed to be paid by him to the plaintiffs as compensation for improvements effected by them during their incumbency of certain lands granted by him to them under a conditional deed of gift, which he has revoked by resuming possession of the lands gifted, and ousting the plaintiffs without judicial proceedings. There is no appeal by the plaintiffs, and therefore it is unnecessary to consider either whether the deed was in its nature revocable at the caprice of the grantor without proof of any breach of its conditions or any judicial proceeding, nor whether the alleged dispossession of the plaintiffs without process of law was legal. Consequently, I remark with emphasis at the outset (with a view to what has to be afterwards discussed) that the plaintiffs must be considered for all purposes affecting the interests, either of themselves or of the defendant, as being out of possession not only *de facto* but *de jure*, and the latter in lawful possession. Also there is no appeal by the defendant appellant against the right of the plaintiffs to *some* compensation (the appeal petition only concerns the amount); nor against the right of persons in the plaintiffs' position to recover the value of improvements by the ordinary process of an action *in personam*, and such right not having been demurred to

or contested, either in the court below or in the petition of appeal, it seems to me rather late to raise the question whether the only remedy competent to a person ejected by one having better title is by retention of the land till the amount is recouped out of the fruits, or till payment by the owner, and not also by an action *in personam*. I think that upon the evidence the plaintiffs are entitled to compensation, and that the plaintiffs should recover compensation from the defendant by the present personal action in the manner prayed or intended to be prayed for in the second paragraph of the prayer of the libel (I do not now speak of the amount): and I therefore think that the learned Judge of the District Court was right in decreeing this to them, and I also think he was right in not granting their next prayer that they be restored to the possession of the land until payment thereof.

It may be convenient at the outset to remark that, as the plaintiffs in the present case had a clear title to the land, though a defeasible one, when they made the improvements for which they seek compensation, their case is very different from that of a party without title who has been ejected by process of law. It is to the latter case only that the civil law authorities on the subject of the action *de Rei Vindicatione* apply. The present plaintiff is altogether outside the scope of that action; his case is more analogous to that of a fiduciary under a *fidei commissum*, and the civil law allows such a person to sue by a personal action for the value of improvements, and does not limit him to a lien on the land. *Voet*, 36, 1, 61, at the sentence, "nec perperam..................eo excepto") on the very ground, as Gaill puts it, that the ordinary rule of the Roman Law, "fails in respect to expenses which have been made by an actual owner. Breviter (he says) impensoe quae rem faciunt meliorem regulariter compensantur cum fructibus, et sic nota casum in quo bonoe fidei possessor fructus suos non facit. Fallit pradicta regula in expensis a domino rei meliorata factis qua perceptione fructuum non extenuantur"—(Gaill, II., obs. 121 § 14). Now, the plaintiff in the present case was as much dominus rei meliorata as is a fiduciary under a fidei commissum. But even if the rules of the action Rei Vindicatio did apply to this case, their application under the Roman Dutch law (which differs in this respect from the Roman Law) would, in my opinion, entitle the plaintiff to an action for the value of his improve-

ments, subject to a set-off for fruits received and certain limitations. Undoubtedly it is true that under the Roman Law the only mode of recovering compensation for improvements on land made by a possessor without good title, when the real owner had vindicated his title to it by the action de Rei Vindicatione, was by its Retention until either he recouped himself from the rents and profits, or the successful claimant reimbursed him; and so also in the case of the action by an heir to recover an inheritance from any possessor, no cross action was allowed to the latter to recover the value of improvements, and his only remedies were by the equitable plea of fraud (exceptio doli) and Retention. But the Dutch and other allied systems of jurisprudence rejected this rule, and Voet says now on principles of natural equity "it is generally admitted that not alone a bonâ fide possessor but even a malâ fide possessor may recover both necessary outlay and also useful outlay, so far as the subject has been bettered by it, non solâ retentione sed et actione, lest otherwise the owner should be enriched by another's loss."—Voet ad Pand. 5, 3. § 23 in fine. This passage it is true has reference to the case where the recovery of an inheritance is in question: but the principle applies equally to other cases where property is recovered from its possessors by the true owners; and accordingly Voet in the title de Rei Vindicatione, Lib. vi, tit. 1. not only says at the end of section 31, that it is beyond all doubt that after judgment the possessor enjoys the right of retention for outlay, but in section 36, after stating the old law that if a possessor has made any outlay on the thing he is condemned to give up, "he has no action for restitution, but only a right of retention as has been more fully stated in the title de Hereditatis Petitione." He adds at the very end of the paragraph the views of the modern jurists in these words: "Cæterorum cum rationi naturali repugnet, alium cum alterius jacturâ reddi locupletiorem, etiam malæ fidei possessoribus consuli solet, ut utilium impensarum habeant repetitionem": and the careful reader will perceive that he illustrates the two titles of the Digest De Hered. Pet. and Rei Vind., each by texts taken from the other, and so treats them as standing on the same footing with respect to the point now in question. Repetitio commonly means recovery by action. But in whatever sense it may be used in this passage, the question seems to me placed perfectly beyond doubt by one of the passages. Voet there cites from Groenewegen. This passage (in Groenewegen

ad Inst. 2, 1. 30) is headed "Ædificans in aliens solo moribus nostris pro impensis habet actionem et exceptionem"—and (at the word cum) runs thus: "Since (&c.,) therefore at the present time (hodie) one who knowingly builds on another's land does not lose the value of the materials and the wages of the artificers, but may retain useful outlay not only by means of a plea [meaning the exceptio doli which if successful entitled him to retain possession till eimbursed], but also may sue for them by action."

In further corroboration of the view I am expressing, I again recur to the rights of a fiduciary restoring property held under a fidei commissum, to whom "non tantum exceptio et rententio; verum etiam actio pro expensis per leges (civiles) data ést."—Voet, 36, 1, 61. In that case indeed it may be true enough that (as Voet elsewhere says) there is no question of either bonâ fide or malâ fide possession: but (firstly) the old distinction between these Voet shews to have disappeared from modern jurisprudence as regards the recovery of utiles impensæ; and (secondly) I cannot conceive any position more analogous to that of the donee of a revocable gift than that of a fiduciary in respect to his defeasible ownership, and his rights to reimbursement for improvements. I think it at the least much more analogous than that of the "Possessor" in the action Rei Vindicatio; and an analogy therefore by which we ought, I think, to prefer to be guided if there were any conflict in modern law between them, which however I venture to think that I have shewn there is not.

I have considered the subject thus far as though the written Kandyan customs were silent on it, but though the particular case may not be found there, I think that the principle that should govern it is not absent, but appears with sufficient clearness, and that, so far as concerns a right of action for improvements, it is in perfect accordance with what I have above held to be the Roman Dutch Law of the Maritime Provinces. In chapter VI., sections 21, 22, and 25 of *Perera's Armour*, it is stated that a person who plants another's land with the proprietor's permission is entitled to full pecuniary recompense for his trouble and expense in case the latter exercises his option (among others) of resuming possession of the improved ground (p. 115); that a mortgagee is entitled to the full value of improvements made with the mortgagor's permission when the proprietor redeems the estate from mortgage (p. 115)

that even when a person has without permission occupied temporarily abandoned lands and built a house thereon, the proprietor must pay the builder the value of the house, if the former objects to the latter removing the materials;—and that if one has re-asweddumised an abandoned paddy field, with or without permission, and the proprietor of the soil claims the field "it must be relinquished to him, but he must remunerate the cultivator for the trouble and expense of restoring the land to cultivation." Clearly, these rights to remuneration imply corresponding rights to action, unless some exception to the general rule is expressly made; but there is nothing to indicate that the sole mode of redress consists in retention of the subject matter or even that such retention could be allowable. The natural development of the principle of these cases would extend it to the case we have before us. I cannot find anything in that work affirmatively indicating a *jus retentionis* either by way of lien for the compensation due, or as a mode of self-payment from the profits. The right of retention is of course not incompatible with an alternative right of action; for the Roman Dutch Law makes them optional, but the Kandyan law is silent as to any right of retention.

For these reasons, I think that on the grounds of strong authority in the Roman Dutch Law, and of fair implication from the Kandyan law, as well as (to use the words of the civilian above cited), that of plain natural justice and reason, the plaintiffs in this case were entitled to recover by action their necessary and useful expenditure on the land of which they have been deprived (probably capriciously or spitefully) by the revocation of the deed of gift in their favour.

I think that they were also originally entitled to retention of the land until either they had recouped themselves from the rents and profits, or the revoking donor had reimbursed them. But this right I think they have now lost; and that therefore the District Judge was right in refusing to restore them to the possession with a view to such retention. *Retentio* is a word of very precise meaning, and has only one meaning in our Law. It is the retention of that which is at the time in our possession. It is the word in our law signified by the English law term "lien"; and equally by our law and by that of England, a lien is gone, and also the right of lien, when the possession has been parted with. In the present case the possession has been parted with; and if the plaintiffs wish to re-estab-

lish their lien, they ought first to sue to be restored to the possession alleging that they had, and are entitled to a lien, and have been forcibly or fraudulently deprived thereof. But neither is the libel aptly conceived for this purpose, nor do the notions of the deprivation of a lien and of an action to recover it seem to have been present to the mind of the person who drew it. However, I hardly think it necessary to dilate on this point, for there has been no appeal by the plaintiffs, and even if they have ground for being aggrieved by the judgment in so far as it refuses to replace them in possession, I think it would be *ultra vires* of the Court to give them this redress in the absence of an appeal by themselves. And that in the Court below was wrong in decreeing compensation (which, however I do not think it was) all we can do is simply to set aside the decree reserving all other rights to the parties.

The sole questions before us are, it appears to me, two: first, does an action *in personam* lie to recover the value of the alleged improvements? second, if so, does the amount awarded by the judgment exceed what is just? On the first point I am of opinion that such an action does lie; and to that extent think the Court below right. On the second point I think the case should go back for reconsideration, and if necessary further hearing and judgment *de novo*; because I cannot find that the learned Judge has proceeded on any accurate principle in assessing the compensation. We have indeed evidence of the value of the land when it was gifted to plaintiffs, and of its value when the gift was revoked: but none of the amount actually expended by them, which is the cardinal consideration. If the plaintiffs are to be considered as mere "possessors" without title, then they are entitled to that amount only after deduction of the rents and profits received, and subject to certain limitations which restrict the amount due to the extent to which the land has been permanently benefited, and others which will be found laid down in Voet. 6, 1, sections 37 and 38: and 3 Burge 34, 35. If they are to be considered as having been owners for the time being like fiduciaries (of whom *Voet* says eo tempore quo impenderunt domini fuerunt rerum illarum in quas impensum est"—*Voet.* 5, 3, 23, in the sentence beginning *nec est.*)—then they are not liable to suffer any set-off from the amount expended by them on account of the rents and profits they received.—*Voet.* 36, 1, 61, *in fin.* and Gaill in the place already cited.—*Sup. Court Cir.* 1880 Vol. III. pp. 31-34.

SECTION 13.

(From Grenier's Appeal Reports.)

Deed of Gift, containing no clause barring grantor from resumption of property, revocable.

Badulla D. C. No. 19360.—The plaintiff claims an undivided half share of certain premises, under bill of sale dated 25th February, 1872, which had been executed in his favour by Meybrink, the husband of the second defendant, to whom the property had been gifted in 1862 by his mother-in-law, the first defendant. The action was for damages and for a decree of title as against both the defendants who, it was alleged, disputed plaintiff's right under the conveyance by Meybrink. The 1st defendant admitted her gift to Meybrink and his wife (the 2nd defendant), but pleaded (1) that the lands in question had been given for their support and maintenance; and (2) that after the marriage, Meybrink having ill treated and deserted his wife and ill-used the 1st defendant, the latter had thereupon resumed possession of the property. The Replication contained a general denial of the allegations in the Answer, save as to admissions; and the case went to trial on the issue as to whether the deed of gift was revocable or not. The material portions of the deed which was a notarial document, were as follows:—

Deed of Gift, containing no clause barring grantor from resumption of property, revocable.

"That Henrietta Tissera (2nd defendant) having been married to Mr. John Meybrink, I the said donor (1st defendant) give and heridate them the undermentioned lands, houses, etc., as a final gift with my good will and pleasure. All the lands, houses and fruit trees valued at £200 in consideration of the foregoing circumstances have been as a final gift given to the said Mrs. and Mr. Meybrink. Therefore after this, I, the donor, my heirs, descendants and administrators from generation to generation can neither claim nor make any dispute in respect of the said lands, houses, etc. From this day the said Mrs. Meybrink and Mr. Meybrink, their heirs and descendants are authorized to hold and possess the said lands and houses in any manner they like and do as they like with the same. I have before this done no act whatsoever against this gift-grant. Further, should any dispute arise in respect hereof, I and my heirs bind ourselves to interfere and settle the same."

The District Judge (*Gibson*) held as follows:

"The facts of the case are these. At the end of 1861 or early in 1862, John Meybrink married 2nd defendant, the daughter of the first defendant, who shortly after the solemnization, on the 13th March, 1862, granted a deed of gift to Meybrink and his wife, when she transferred to them jointly the specified ¼ of Antalawe, a room in the house standing thereon, and a piece of ground, 30 feet long and 12 feet in breadth, adjoining the said house. John Meybrink and 2nd defendant continued to live together as man and wife, partly in Badulla and partly in Antalawagedera, till 2nd defendant was about to be confined, when Meybrink took her to her parent's house, where she appears to have lived ever since; and it would appear from the evidence that after she gave birth to the child, Meybrink gave up visiting her altogether. In December 1863, one Mr. Stouter put Meybrink in Court to recover from him a certain sum for goods sold and delivered, and obtained judgment; writs were issued and ½ of the ¼ of Antalawe, which had been given by 1st defendant to him and 2nd defendant, was sequestered, and not sold on account of 1st defendant opposing it;—in consequence of this Meybrink got angry with 1st defendant and her children, and committed an assault upon them, for which he was tried before the Hon'ble the Supreme Court of Kandy, was convicted and sentenced to corporal punishment and to imprisonment for a term of two or three years. On his being discharged from gaol, he went to take possession of the land, but his possession was opposed by defendants. Subsequently, on 26th April, 1872, he transferred the said land to plaintiff, who goes to take possession of it, but is also prevented from so doing by defendants, and in consequence thereof, he, on the 22nd August, 1872, brought the present action.

* * * The Court is of opinion that it is implied in the deed of gift that Meybrink should support and maintain his wife, and it is very clear from the authority cited by defendant's counsel (*Armour*, page 91)* that if the donee fails to comply with any condition, whether such failure arise either from poverty, or, as in this, originally from his wilful neglect and subsequently on his having been deprived of his liberty, the deed becomes null and void. Gross ingratitude, misbehaviour and violence to donor have also been proved against Meybrink, which also annul the deed. The Court con-

* *Perera's Edition.*

siders that of itself the deed became null when Meybrink so grossly misbehaved himself in assaulting first defendant and her children, and that there was no ground to have the deed revoked by a Court of law. On these grounds it is considered that Meybrink's transfer to plaintiff was illegal, as by his misconduct he had forfeited his right to the lands."

In appeal, Ferdinands, for appellant. The deed being a formal gift of only a portion of the donor's estate was not revocable, *Austin,* p. 43. It was besides unconditional, and, being burdened with a warranty clause, was intended to be absolute and *final,* as expressly recited therein. The deed, moreover, had not been altered or annulled by any notarial instrument, and hence the legal title at the date of the conveyance to plaintiff was in his vendor. *Austin,* p. 159.

Ondaatje, for respondent. Meybrink having failed to fulfill the implied condition in the deed that he would maintain and support his wife, the gift became null and void.—*Armour,* p. 91.* Further, the donor here had resumed possession in consequence of the donee's ill-usage, and no deed of revocation was necessary.—*Armour,* p. 92 † *Solomons,* p. 25.

Per CAYLEY, J.—" Affirmed. This deed of gift, which was not granted in consideration of marriage, and contains no clause barring the grantor from resumption of the property, appears to us to be revocable under Kandyan Law, and not to come within the class of irrevocable deeds given by *Armour* ‡ The resumption of the land by the donor in consequence of ill-usage from the donee (both of which are fully proved) is sufficient by Kandyan Law to render the gift null and void.—See *Armour,* p. 90.§ We do not agree with the judgment of *Mr. Justice* CARR reported in *Austin,* *p.* 159."—*Gren. Rep.* 1874. Part III. pp. 24- 26.

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* *Perera's Edition.*
† *Perera's Edition.*
‡ *Perera's Edition, p.* 95.
§ *Perera's Edition.*

CHAPTER III.

ON MARRIAGE.

Section I.

(From D' Oyly's Notes on Kandyan Law.)

1. First feast, on the approval of the suit.—2. Second feast, on the day the horoscopes of the bride and bridegroom are examined.—3. Third feast, on the day the bridegroom's parents present the bride with a suit of apparel.—4. Fourth feast, on the day the ceremony of the ligature takes place.—5. Fifth feast, on the seventh day after the nuptials, when the ceremony of bathing the bride and the bridegroom takes place.

1. [The following are the ceremonies observed by the higher and influential classes of the Sinhalese in contracting marriage.]

First feast, on the approval of the suit.

On choice being made of a bride, the bridegroom's kinsmen give intimation thereof to some of the bride's friends, who consult her parents or guardians and other relations, and if they approve of the proposed match, the bridegroom's friends are informed thereof, whereupon some of the latter pay a visit in form to the bride's family, and having seen the bride and received assurance that the suit was sanctioned, they return, after being treated with rice or betel.

Second feast, on the day the horoscopes of the bride and bridegroom are examined.

2. Afterwards a relation of the bridegroom goes to the bride's with presents of cakes, &c., and returns thence with her nativity or horoscope: this is compared with the bridegroom's to ascertain whether the union of the two persons will be happy and fortunate. If the nativities are accordant and compatible, an auspicious day is appointed for the wedding and the bride's parents or guardians are apprized thereof.

Third feast, on the day the bridegroom's parents present the bride with a suit of apparel.

3. On the day appointed, presents of betel, cakes, fruits, &c., are forwarded to the bride's, and then the bridegroom's father proceeds thither in state, followed by the bridegroom's mother, with proper attendance; and, lastly, comes the bridegroom. On the party approaching the bride's residence, a brother and a sister, or an uncle and an aunt of the bride, go out to meet them in similar form and state, and conduct them to the house; when they arrive at the outer gate of the house and have stepped on the cloth spread for them to walk upon into the interior of the house a coconut is smash-

ed into pieces in the name of *Ganeswera*, or the god of wisdom, and on the parties entering the apartments prepared for them respectively, the ceremony of invoking long life is performed, and the gods of wisdom again propitiated by breaking a cocoanut.

Fourth feast, on the day the ceremony of the ligature takes place.

4. Previous to the auspicious moment of solemnizing the marriage, the bridegroom's mother delivers a valuable cloth *Killireda Hela* to the bride's mother, with another cloth and a set of jewels, and the bride's father gives a suit of apparel to the bridegroom. The happy moment being arrived, the bridegroom throws a gold chain over the bride's neck, and then presents her with a complete set of apparel and ornaments, and the bride being arrayed therewith, steps up along with the bridegroom on the *Magulporua*, or wedding plank, which is covered with a white cloth. The bride's maternal uncle or some other near relation then takes a gold chain and therewith ties the little finger of the bride's right hand with that of the bridegroom's left, and the couple then turn round upon the plank three times from right to left, the chain is then taken off, and the bridegroom moves to a seat prepared for him. The *Magul pata*, or wedding plate, is then brought in, from which the director of the ceremonies takes rice and cakes, and making balls of them, gives the same to the bride and bridegroom, who make reciprocal exchange thereof in token of conjugality. The guests and the rest of the company are then served with victuals, betel and sandal.

On the couple quitting the bride's to go to the bridegroom's house, they are accompanied by a kinsman of the former with proper attendance. On approaching the bridegroom's residence, they are met by a kinsman of the latter attended with talipots, torches, &c , who greets the bride's kinsman and conducts the party in. Here also a coconut is smashed on the ground in the name of *Ganeswara*, and the ceremony is repeated of wishing longevity. After suitable entertainment, the bride's kinsman and other guests depart.

Fifth feast, on the seventh day after the nuptials, when the ceremony of bathing the bride and the bridegroom takes place.

5. On the seventh day after the last mentioned ceremony the festival of bathing the head takes place. The young wife's uncle and aunt or other near relations, repair to the house of the new married couple in due style, and are formally welcomed; the open space near the apartment alloted to them is enclosed on all sides and covered with cloths, a plank being placed on the ground within, the young couple stand on the plank side by side, with their heads covered with a cloth. New earthen pots filled with water are then brought in,

and some person on behalf of the husband drops a rupee or a gold pagoda into each of them and presents a gold ring to the wife's uncle, who, having awaited the auspicious moment, takes up the water pots and empties them upon the heads of the young couple. After this ceremony the visitors are feasted and permitted to depart.

After the lapse of some days or months, the wife's parents pay a formal visit to the young pair, attended by followers, &c. On this occasion they bestow, according to their means, a dowry on their daughter, consisting of goods, lands, &c., and after the lapse of some time again, the new married couple pay a ceremonious visit to the wife's parents.

The washer employed to decorate the bride's house with white cloth on the wedding day, receives five *ridies* from the bridegroom; he also receives five *ridies* for spreading the cloth on the *Magul porua*, and the person who conducted the bride to the bridegroom's house after the marriage ceremony, pays five *ridies* to the washer who decorated the bridegroom's house for the occasion. —*D'Oyly's Notes, p.* 19.*

SECTION 2.

(From Sawer's Digest on Kandyan Law.)

1. Different kinds of marriage.—2. Requirements of a lawful marriage.—3. Prohibited Marriages.—4. Community of goods none.—5. Marital power of the husband.—6. Where the marital power of the husband is limited.—7. Marital power of the wife.—8. Dissolution of Marriage.—9. Husband, when heir to his wife's landed property, and when not.—10. Parents and children.—11. Brothers and sisters.—12. Nephews and nieces.—13. Widows and widowers.

Different kinds of marriage.

1. Marriage among the Kandyans may be considered of two descriptions as regards civil immunities, and designated,—

1. Marriage in *Diga*.
2. Marriage in *Binna*.

The former being the most common; that is, where the bride quits the family of her parents to go and live with her husband at his own house; and the latter, the

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* See Ord. No. 13 of 1859, to be read with Ords. Nos. 4 and 8 of 1860 and 8 of 1861.—See also Ord. No. 3 of 1870, to be read with No. 9 of 1870, and the *Government Gazette* No. 3781 of August 27th, 1870.

Binna being that where the husband goes to live at the house of the bride's family; which last occurs only in the case of the bride being an heiress or the daughter of a wealthy family where there are few sons.—*Saw. Dig p.* 32.

Requirements of a lawful marriage.

2. What constitutes a regular marriage is as follows.—The consent of the respective heads of the families, the countenance and sanction of the relations to the third or fourth degree on both sides to the union of the parties; that they must be of the same caste and of equal family respectability and rank, which is chiefly ascertained by the families having previously intermarried, and where this has not been the case they are particularly scrupulous; and affluence and prosperity for the time being, on one side, will hardly induce an ancient family to deviate from this rule.

To prove a regular marriage will be to make it appear that the usual ceremonies were observed, such as the making of presents by the family of the bridegroom to the family of the bride; that the proper messages established by custom and the replies thereto passed between the heads of families on both sides, that the horoscopes of the parties to be united were duly examined and found to be compatible with each other so as to secure an auspicious union; that the bride was conducted home to the house of the bridegroom in due form by his relations; as must be the case in a *Diga* connection, when the bride quits the house of her own family to go and live in the house of her husband, or that the husband was received into the house of the bride's family with similar ceremonies, that his family attended the marriage feast at the house where the newly married couple were to reside, whether that was at the family house of the bride as in a *Binna* connection, or at the house of the bridegroom as in a *Diga* connection.—*Saw. Dig. p* 31.

Prohibited marriages.

3. Marriages cannot be contracted between parties in any nearer degree of relationship than that of first cousins, being the children of a brother and sister. This however is the most common, and is considered the most becoming matrimonial union that can be made; but the children of two brothers cannot intermarry, nor can the children of two sisters, their offspring being considered respectively brothers and sisters to each other.

Incestuous marriages, and such intercourse between the sexes, are penal.

The marriage of a man with a woman of a superior caste to himself is prohibited; and even carnal connec-

tion between the sexes of different castes, is penal, especially the connection of a higher caste woman with a lower caste man.—*Saw. Dig p. 35.*

Community of goods, none.

4. Under neither of the above modes of marriage can there be said to be a community of goods between the husband and wife. For, in a *Diga* marriage whatever property the wife brings with her in the shape of dowry, and even what she acquires independently of the husband after marriage, he has no power over; but the wife, in the absence of the husband, is considered to be the manager of her husband's affairs, and therefore under such circumstances she may make use of his property for the maintenance and benefit of the family. She may sell the produce for this purpose and even mortgage the lands if necessary to procure subsistence though she cannot sell them; but the husband can make no such use of the wife's property, without her special consent.— *Saw. Dig. p. 32.*

Marital power of the husband.

5. The husband can at his pleasure repudiate his wife; but the wife cannot separate herself from her husband without cause, with the exemption hereafter mentioned.

The wife with the consent of her parents can separate herself from her husband and thus dissolve the marriage without her husband's consent, or without any fault on his part. But the parents of the wife who has been given to the husband by their consent, cannot take her from her husband without her consent so long as the husband conducts himself so as not to cause disgrace to his connections.—*Saw. Dig. p. 34.*

Should the wife be repudiated in a state of pregnancy, the father has no right to claim the child, when of sufficient age to be taken under his care as the heir of his property; but if the mother refuses to give up the child to the father she must support it by her own means.—*Saw. Dig. p. 34.*

If the wife separates herself from her husband without his consent, or contrary to his wish, he can either retain the whole of the children or constrain her to take a certain number of them with her, not exceeding half their number. She is not in this case entitled to anything from the husband, however indigent may be her circumstances. She must even leave her wearing apparel which she had received, from her husband, if that were but her only cloth. – *Saw. Dig. pp. 33, 34.*

But if the husband repudiates his wife without a sufficient cause, and she and her own family being in

indigent circumstances, she has the privilege of either refusing to take any of the children with her, on her return to her paternal roof, or she can demand to have one or two of the children given up to her, to be entirely at her disposal even should she form another *Diga* connection; and such children shall still be entitled to an equal right of inheritance in their father's estate with the children he has retained with him, and can return and claim maintenance from him at any time.—*Saw Dig. pp.* 33, 34.

A husband is only liable for such debts of his wife, as have been contracted by her from necessity, for the maintenance of herself and her family. The wife is not liable for the debts of her husband, excepting such debts as have been contracted with her consent, and which she has sanctioned by making herself security for the same, *i. e* which she has contracted jointly with her husband, but the knowledge and sanction of both the parties imply securityship for each other.—*Saw. Dig. p.* 34.

Where the marital power of the husband is limited.

6. The husband married in *Binna* has no privileges in his wife's house; he has no power over her property, he may be expelled or divorced by the wife or her parents at any moment. But if the *Binna* husband was called to the wife by her parents, in that case after the parent's death, the *Binna* husband cannot be expelled from the house by the brothers of the wife without the wife's consent —*Saw. Dig. p.* 35.

Marital power of the wife.

7. The wife has the power of refusing to admit a second associated husband, at the request of her first husband, even should he be the brother of the first, and should the proposed second associated husband not be a brother of the first, the consent of the wife's family to the double connection is required. —*Saw. Dig. p.* 35.

Dissolution of marriage.

8. In the event of a separation or divorce, the wife can carry away nothing from the house or estate of her husband, but she is entitled to carry away with her all the property she brought with her, at her marriage, as well as the property she may have individually acquired during the coverture, any landed property she may have originally had or may have acquired during the coverture remains under her own management, and at her own disposal.—*Saw Dig. p.* 53.

Husband when heir to his wife's landed property, and when not.

9. The husband is heir to his wife's landed property, which will at his demise go to his heir; but in the event of the wife having left a son, and the father contracting a second marriage and having issue of the second bed, in this case, on the death of the father, the

son of the first bed would inherit the whole of his mother's estate, with a moiety of the father's estate, while the children of the second bed would inherit the second moiety of the latter estate, but in the event of the son of the first bed dying without issue, the children of the second bed would only inherit the moiety which descended to him of his father's estate, while his mother's estate would revert to his mother's family. —*Saw. Dig p.* 8.

A wife dying intestate leaving a son who inherits her property and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother; at the father's death such property goes to the son's uterine brothers or sisters if he have any, and failing them, to the son's nearest heirs or his mother's family. —*Saw Dig p.* 9.

A wife dying leaving a husband and children, her peculiar property of all description goes to her children, and not to her husband.—*Saw Dig p,* 15.

A debt contracted by a *Binna* husband without the consent or knowledge of his wife, the wife was not liable to pay; a *Diga* wife is liable to pay the debts of her deceased husband whether she may have inherited property from him or not; the husband is liable to pay such debts of his wife as she had contracted for the purposes of the family, but not such debts as are unnecessarily contracted and without the knowledge of the husband.—*Saw. Dig. p* 17,

A wife dying barren or without surviving children, all the property which she received from her parents reverts to her own parents or brothers and sisters and their issue, but the husband inherits all the property acquired during the coverture, but that only; property acquired under a former marriage or when single would go to her nearest of kin in her own family; but failing brothers and sisters and their issue, the husband comes in before the wife's uncles and aunts and their issue. —*Saw. Dig. p* 16.

Parents and Children.

10. It is stated unanimously by the Chiefs who have been consulted, that a person having the absolute possession of real or personal property has the power to dispose of that property unlimitedly, that is to say, he or she may dispose of it, either by gift or bequest away from the heirs at law.—*Saw. Dig p.* 1.

When a man dies intestate, his widow and children are his immediate heirs—but the widow, although she

has the chief control and management of the landed estate of her deceased husband, she has only a life interest in the same, and at her death it is to be divided among the sons, excepting where there is a daughter or daughters married in *Binna*, these or rather their children, have the same right to a share of their father's lands as their brothers.—*Saw. Dig. p.* 1.

Daughters must accept the husbands chosen for them by their parents, or in the event of their being dead, by their brothers, and must go out with them in *Diga*, but in the event of such a husband turning out badly, disinheriting her children and compelling the wife to return to her father's house, the brothers in that case are bound to make provision for their unfortunate sister and her children out of her father's estate —*Saw. Dig. p.* 3.

Daughters, while they remain in their father's house, have a temporary joint interest with their brothers in the landed property ot their parents, but this they lose when given out in what is called a *Diga* marriage either by their parents, or brothers, after the death of the parents. It is however reserved for the daughters in the event of their being divorced from their *Diga* husbands, or becoming widows destitute of the means of support, that they have a right to return to the house of their parents and there to have lodging and support and clothing from their parent's estate—but the children born to a *Diga* husband have no right of inheritance in the estate ot their mother's parents.—*Saw. Dig. p.* 1.

A daughter having a *Binna* husband in the house of her parents, her children have the same right of inheritance in the eatate of their mother's parents as the children of their mother's brothers, but if the children of the daughter having a *Binna* husband inherit any considerable landed estate from their father, in that case their shares of their mother's family estate would be proportionally diminished.—*Saw. Dig. p.* 3.

A daughter married in *Binna* quitting her parents' house with her childern to go and live in *Diga* with her husband before her parents' death, forfeits thereby for herself and her children a right to inherit any share of her parent's estate, (she having at the time a brother or a *Binna* married sister) unless one of her children be left in her parents' house.—*Saw. Dig p.* 3.

The daughter being the only child of a man's first or second or third marriage will have equal rights with her brothers of the half-blood in their father's estate even if given out in *Diga*.—*Saw. Dig. p.* 3,

The only daughter of a deceased brother or sister having had a *Binna* husband, is entitled to her parents' share of the family estate, nor does she lose her right to such share by being married in *Diga*, unless she shall have been given away in *Diga* marriage by her grandfather or grandmother; in this case she would lose her right of inheritance—but her being given so away by her uncles would not deprive her of her right of inheritance in her grandfather's or grandmother's estate, provided she shall duly perform the public service or *Rajakaria*.—*Saw. Dig. p.* 4.

When a man has children by different wives, his landed property should be divided into two or more shares, according to the number of wives by whom he has children, and each family should have one share without reference to the number born of each bed, that is to say, supposing a man to have two wives, the first wife's family consist of three children, and the second wife's of one—the three children of the first wife will have one moiety of the estate, and the only child by the second wife the other moiety.—*Saw. Dig. p.* 4.

Two half-brothers associated with one wife are heirs reciprocally to each other in preference to brothers of the whole blood. Suppose A leaves two sons by his first wife and two sons by his second wife, and at his death his property is equally divided among the four sons, but if one brother of the first wife becomes the associated husband of one wife with a son of the second bed, in that case these two half brothers would inherit from each other, unless the association had been entirely dissolved before the death of one of them.—*Saw. Dig. p.* 10.

Where an estate is enjoyed undividedly by two or three brothers having but one wife in common, on the death of one of the husbands and the wife, or in the event of the wife being divorced after the death of one of the husbands, the children being the issue of the joint connexion can claim the share of the deceased father to hold it independently of their surviving father or fathers after such a joint connexion as that stated above; and after issue, should one of the brothers quit the joint connexion and take a wife for himself alone, and have issue also by her he dying intestate, his share of the family property should be divided between the issue of his first wife which he had in joint connexion with his brother or brothers and the issue of his sole wife, each a moiety; nor has the brother who capriciously detached himself from a joint connexion after issue born under the same, the power of depriving

his first family of the whole of his share of the family estate. A moiety at least of his share should remain with his first family, begot under common connexion of him and his brothers with his first wife.—*Saw. Dig*, *p* 5.

Where an estate is enjoyed undividedly or otherwise by three brothers, two of whom being married to one wife, while the third brother has a separate wife; in the event of one of the friendly or associated brothers dying without issue, the other brother with whom he had the joint wife shall be his sole heir; the brother having a separate wife shall have no share of such demised brother's property of any kind.—*Saw Dig, p* 5.

The acquired property of one associated brother goes to the other associated brother, the deceased having no issue, but the property which the deceased associated brother had acquired from either of his parents would revert to that parent, and a man dying without issue having an associated husband with his wife, that associate being a cousin or a stranger, the associates are the heirs of each other reciprocally to the property of all kinds which the deceased may have acquired during the association—but not of the property which the deceased may have received from his parents or brothers or sisters, or has inherited in any way from his own family.—*Saw. Dig. pp.* 5. 6.

Should an associated husband die leaving children by a former single marriage, the children of that marriage would be his heirs, excepting to the property acquired during the association, such acquired property would go to his associate.—*Saw Dig p*. 6.

A son detaching himself from his family and forming a *Binna* marriage in another's house, does not lose his right of inheritance in the estates of his parents, but if he neglects asserting his rights in this respect, in his life time, his children would have but a weak and doubtful claim on the estate of their father's parents for their father's share; generally speaking, such claims are considered to be destroyed by the neglect of the father.—*Saw. Dig. p.* 6.

The same rule as above applies to a son adopted by an uncle or aunt or by a stranger, to inherit the property of the adopting parent—the son so adopted does not thereby lose his right of inheritance in the estate of his parents who begat him, but a daughter so adopted, would, unless she were an only child, lose her right of inheritance in her parent's estate, the same as if she had been given out in *Diga*.—*Saw. Dig. p.* 5.

A son becoming a Priest, thereby loses all right of inheritance in the property of his parents, because to take the robe is to resign all worldly wealth, nor shall he be restored to his right of inheritance by throwing off the robe after his father's death unless he shall have done so at the request of his brother, or by the unanimous request of his brothers, as the case may be; in that event he will have a right to that share of his parents' property which would have fallen to him, had he never taken the robe, but should one brother without the consent of his other brothers being laymen induce the brother being a priest, to throw off his robe, then that brother shall provide for the *Siwrala* out of his share of the property, solely. The *Siwrala* shall have no right to demand any portion out of his other lay brother's share. But should a priest be stripped of his robe for some violation of the rules of his order, or from caprice throws it off, he has in neither case a right to inheritance from the estate of his parents.—*Saw. Dig. p.* 7.

The mother is heir to her children, even to the *parveny* property of her deceased husband, through them, but if she dies intestate, the estate will revert to her husband's family, whose *parveny* property it was; with this exception, if the mother has children either by a former or subsequent husband, these children being the uterine brothers and sisters of the children through whom she inherited the estate, will inherit the same from her; and children of the same mother by different fathers, are heirs reciprocally to each other after the children of the whole-blood have failed, but if the mother has been divorced by any of her husbands, the children born to other husbands cannot inherit the property of the children whom she had borne to the divorcing husbands.—*Saw. Dig. pp.* 8. 9.

An unmarried daughter acquiring property and dying intestate her property goes to her mother; failing the mother, to the father; and failing the father, to her brothers and sisters of the whole-blood; if there be but one such brother the whole goes to him, if there are several brothers they shall share equally; failing brothers and sisters of the whole-blood to the brothers and sisters uterine of the half-blood, and failing them to the brothers and sisters of the half-blood by the father's side, and failing them to the maternal uncle, failing him to the maternal aunt, and failing the maternal aunt, to the maternal grandmother, failing her to the maternal grandfather, failing him to the paternal uncle, and

failing him to the paternal aunt, failing the paternal aunt to the paternal grandfather, and failing him to the paternal grandmother, failing the paternal grandmother, to the maternal uncle's sons and daughters and failing them to the maternal aunt's sons and daughters or grand-sons and grand-daughters, and failing them to the paternal uncle's sons and daughters or grand-sons and grand-daughters, and failing them to the paternal aunt's sons and daughters, or grand-sons and grand-daughters.—*Saw Dig. p.* 17.

The assessors unanimously state that the mother is the heiress to the acquired property of all kinds of her children dying unmarried and without issue, and that the same is entirely at her disposal, but should *she* die intestate, the property would go to the brothers and sisters of the whole-blood equally, and failing them to brothers and sisters of the half-blood utrine.—*Saw. Dig p.* 17.

A parent is not liable to pay the debts of a child unless that debt had been contracted for the benefit of his parent's family; a father could not be seized for his son's debts.—*Saw. Dig. p.* 19.

The debts of the deceased must be paid by those who inherit his or her property according to the value of their respective shares—the money and paddy or grain debts should be paid by those who inherit the lands, but if the moveable property of the deceased be large in proportion to the landed property, the heirs of the moveable property must pay a share of the debt in proportion to the value of the moveable property.—*Saw. Dig p.* 18.

It is a pious duty incumbent on sons to pay their parents' debts, although they may not have inherited any property from them. The sons, and failing sons the daughters, could be seized as slaves for the debts of parents after the death of the parents.—*Saw. Dig. p.* 18.

The family of a man or woman which has been separated and apportioned off, when such man or woman shall have made a second marriage, the members of such separated family shall neither have a right to share in the estate of their parent at his or her death, nor shall they be liable for the debts of their parents contracted after the separation, the issue of the second marriage shall inherit the whole estate and be liable for the debts, but the separation must have been completed and indubitable.—*Saw. Dig. p.* 18.

Property given to a concubine or acquired by her if she dies intestate and without issue, follows the same

rule of inheritance as the property of an unmarried woman, but if a concubine or a prostitute leave issue they inherit their mother's property.—*Saw. Dig p.* 18.

A man dying intestate leaving neither widow nor children, his moveable property goes to his parents, failing them, to such of his brothers and sisters who have rendered him support and assistance on his death bed, and failing them, to his next of kin or those who have rendered him assistance; excepting in cases where the property is more than amounts to a fair recompence to the stranger who has rendered the deceased assistance, in this case the stranger must be satisfied with a compensation out of the deceased's property, and the remainder goes to the next of kin as above, and failing parents, or sisters, or brothers, the nephews and nieces inherit according to the share their parents would have been entitled to; and in this respect the children of brothers and sisters have equal rights, and failing sisters and brothers and their children, the property of the deceased will go to the uncles and aunts or the issue on both the mother and father's side, that is to say, one half to the kindred on the father's side, and one-half to the kindred on the mother's side, but this rule applies only to the acquired property of the deceased; for whatever he got through his mother will revert to the mother's family, and what came from or through the father will revert to his father's family.—*Saw. Dig. p.* 15.

The property of a deceased person goes to the crown only after no kindred can be found to inherit. —*Saw. Dig p.* 16.

Brothers and sisters.

11. The right of inheritance of uterine children of the half-blood is postponed to that of paternal uncles and aunts and their issue, except in respect to the mother's property; for example, Lokoorale marries Kallu Etena and has issue Tikirale. Lokoorale dies, his widow is taken for wife by Sirimalhamy and has issue. Tikirale dies, and his property, which he inherited from his father Lokoorale, reverts to the brothers or sisters of Lokoorale and does not go to the issue of Sirimalhamy, though they are of the half-blood with Tikirale, being children of the same mother; but this supposes Kallu Etena to be demised; for, the mother surviving is the heir of her children, and in that case the property of Tikirale would become absolutely the property of his mother Kallu Etena and entirely at her disposal.—*Saw Dig p.* 10.

The property derived from the father goes to the

half-brothers on the father's side in preference to the half-brother by the mother's side; as for example, A has by his first wife a son and by his second wife another son, then A dies and his estate is divided; his widow forms a second marriage and bears children to her second husband and dies, the son of her first husband then dies without issue; his share of A's estates goes to his brother of the half-blood on the father's side, viz; the elder son of A in preference to his mother's son by her second marriage.—*Saw. Dig. p.* 10.

In respect to the father's property, the right of inheritance of the half-blood is postponed to that of the brothers and sisters of the whole-blood; for example, A has by his first wife two sons and a daughter and by his second wife two sons. The father being dead on the demise of one of his sons of the first bed without issue, no part of his property would go to the children of the second bed or half-blood, but the brother and sister of the whole-blood would inherit the whole of the deceased brother's property, but in failure of the brothers and sisters or their issue of the whole-blood, the brothers and sisters of the half-blood are the next to inherit.—*Saw. Dig. p.* 9

Nephews and nieces.

12. Nephews or nieces of the whole-blood (the children of a brother or sister of the whole-blood) succeed before nephews and neices of the half-blood (the children of the brothers or sisters of the half-blood.) —*Saw. Dig. p.* 11.

Nephews and nieces of the whole-blood succeed before brothers of the half-blood —*Saw Dig. p.* 11.

Widows and widowers.

13. A widow, whose husband has left no issue, is entitled at her husband's death to the whole of her husband's moveable property, including money, grain, goods, slaves and cattle, unless the three last mentioned have been heirlooms of her husband's family, *i e.*, which he had inherited or received with the landed estate of his ancestors, but all goods, slaves or cattle acquired by the husband during the coverture by purchase or by gift from others, the widow is entitled to, but she is not entitled to any share of the produce of the slaves or cattle being the original stock of the husband's family.—*Saw. Dig p.* 22.

On leaving her husband's house the widow is entitled to carry with her all such property as she is entitled to by the above article, but if her husband's family-lands have been burthened with debt or mortgaged dy her husband's ancestors, the widow must

give up as much of the moveable property as will amount to half the sum necessary for the disburthening or dismortgaging the landed property of the deceased husband, but if the deceased hu band had himself burthened with debt or mortgaged his family estate, then his moveable property is liable to the last article to be disposed of for the liquidation of the same, in which case the widow could get nothing, if the debt of the deceased exceeded the value of his moveable property to which she is entitled.—*Sow Dig. p.* 22,

The widow has no right to dispose of her husband's lands contrary to what the law directs, although she has the usufruct of them, unless she was specially authorized by her husband that he might thereby secure to his relict the dutiful obedience of his children. This is a common ease.—*Saw. Dig. p.* 23.

But if the barren widow be the husband's paternal aunt's daughter, or his maternal uncle's daughter, she inherits next to full brothers the acquired lands.—*Saw. Dig. p.* 23.

If a widow, without being opposed by her deceased husband's family takes a *Binna* husband into the house or her deceased husband to assist and protect her, the children by her first husdand, may, on coming of age, expel the second husband and children of their mother by her second husband, they however cannot expel the mother; but if the half-blood uterine are allowed to remain in the house, they, in failure of issue of the children of the first bed, would inherit the property of the children of the first bed.—*Saw Dig. p.* 39.

SECTION 3.

(*From Marshall's Judgments.*)

1. Husband and wife.—2. Parents and children.—3. Brothers and sisters.—4. Nephews and neices.—5. Widows and widowers.

Husband and wife.

1. The husband is heir to his wife's landed property [but see further in this par. this position controverted] which at his death goes to his heirs; but if the wife leave a son and the father marry again and have issue of the second bed, in such case, on the death of the father, the son of the first bed would inherit the

whole of his mother's estate, while her children of the second bed would inherit the other moiety of the latter estate, and in the event of the son of the first bed dying without issue, the children of the second bed would only inherit from him the moiety which had descended to him of the father's estate, and his mother's estate would revert to his mother's family. This, adds Mr. Sawers, is the opinion of Doloswala Disswa of Saffragam. But the chiefs of Udarata are unanimously of opinion that the husband is not the heir to his wife's landed parveny estate which she inherited from her parents, nor to her acquired landed property, that on the contrary the moment the wife dies the husband loses all interest in her estate, which, if she had left no issue, reverts to her parents or their heirs, and that though the wife is entitled to the entire possession of her deceased husband's estate so long as she continues single and remains in his house, yet the husband must quit his wifes estate the moment she dies.—*Mar. Judg. p.* 339 § 81.

If a wife and children are obliged to quit the husband's house from the means of subsistence failing to be sufficient for the whole family; this does not prejudice the right of inheritance of her or her children to the property of the husband.—*Mar. Judg. p.* 343 § 93.

Parents and children.

2. The eldest son has no right to a better share of the estate of his parents than his other brothers and his sisters having *Binna* husbands.—*Mar. Judg. p.* 327 § 52.*

"Daughters while they remain in their father's house have a temporary joint interest with their brothers in the landed property of their parents; but this they lose, when given out in *Diga* marriage by their parents, or by their brothers after the death of their parents."† [But not, it would seem by half brothers; for in a case in which this question arose, and in which the Judicial Commissioner of Kandy, doubted whether the being married out in *Diga* would operate to the disherison of the daughters, though he entertained no doubt that such a marriage by the whole brothers would have that effect; eleven chiefs were consulted and gave their opinion that the daughter did *not* forfeit her right of inheritance by being so disposed of. No. 6,754 Ratnapura 26th Oct.

* See *Saw. Dig. p.* 3.
† See *Saw. Dig. p.* 1.

ober 1833, mentioned infra : par. 68, for another point; see also par. 65 as to uncles giving their nieces out in *Diga*. "It is however, reserved for the daughters in the event of their being divorced from their *Diga* husbands, or becoming widows destitute of the means of support, that they have a right to return to the house of their parent's estate. But the children, born to a *Digá* husband, have no right of inheritance in the estate of their mother's parents.' * This last position is to be taken as opposed to the rights of sons and of daughters married in *Binña*. As regards collaterals and more distant relations, we shall see that the children of *Diga* married daughters have in many cases a preferable claim—Indeed the exclusion of *Diga* married daughters themselves would seem only to have reference to sons, and *Binña* daughters, themselves would seem only to have reference to sons and *Binna* daughters of the same bed ; for we shall see presently par : 59 that *Diga* married daughters being the only issue of that bed have joint, if not an equal right with their half brothers to their father's estate.—*Mar. Judg. p.* 327 § 53.

"Daughters, before marriage or returning from a *Diga* marriage, have an equal claim for maintensnce from the share of all their brothers, although of the whole or half blood, that is to say, from all the shares into which their parent's estate may have been divided." †—*Mar. Judg. p.* 331. § 60.

A daughter being the only child of a man's first or second or third marriage, will have equal rights with her brothers of the half blood, in her father's estate, even if given out in *Diga*. This rule is qualified by the chiefs who say that where there is an only daughter, or only daughter of one bed, though such daughters would have absolute or *parveny* rights in their shares; they would be entitled to shares inferior to those of their half brothers ; commonly one half as much.—*Mar. Judg. p.* 331. § 59.

"The only daughter of a deceased brother or of a sister, having had a *Binna* husband, is entitled to her parent's share of the family estate, nor does she lose her right to such share by being married in *Diga* marriage by her grand-father or grand-mother, in which case she would have a right of inheritance, but her being so given away by her uncles would not

* See *Saw. Dig. p.* 2.
† See *Saw. Dig. p.* 3.

deprive her of her right of inheritance in her grand-father's or grand-mother's estate, provided she duly perform (or cause to be performed) the *Rájacária* * : Vide Supra : para : 53 as to the effect of being given out in *Digá* by brothers or half brothers.—*Mar. Judg. p.* 332. § 65.

If, however, a daughter, who has been given out in *Digá*, should afterwards return to the house of her parents, with the consent of her family, and then marry a *Binná* husband, the issue of this connexion will have the same right of inheritance in the estate of their maternal grand-father or grand-mother, as the issue of her uterine brothers.—*Mar. Judg. p.* 328. § 54.

"On failure of the issue of sons, and of daughters married in *Binná*, a *Digá* married daughter would succeed ; but if she be dead her father's brothers succeeded before her children ; and again, if the brothers be dead, the *Diga* daughter's children succeeded before the children of her father's brothers"†—on this point Mr. Sawers observes there appears to be a considerable degree of uncertainty, but the chiefs seem pretty unanimously of opinion that where two brothers have possessed the family estate undividedly the one brother would succeed to the other in preference to the other daughters married in *Diga* ; but when the family estate has been divided and so possessed by the two brothers, the children of a *Diga* married daughter would succeed to their maternal grand-father before their grand-father's brothers ; (and even in the first instance, that is, where the brothers have possessed the estate un-dividedly) the children of the *Digá* married daughter, if they became destitute, but not otherwise, would have a right to claim support from their maternal grand-father's estate, though the Parveny right to that estate would be in their grand-uncle (maternal grand-father's brothers).—*Már. Judg. p* 328. § 55.

A daughter having a *Binna* husband in the house of her parents, her children have the same right of inheritance to the estate of their mother's parents, as the children of their mother's brothers ; but if the children of the daughter having a *Binna* husband inherit any considerable landed estate from their father, in that case, their share of their mother's family estate would be proportionably diminished.—*Mar. Jud.g. p.* 328 § 56.

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* See *Saw. Dig. p.* 4.
† See *Saw. Dig. p.* 2.

The same custom regulates the succession to the mother's as to the father's estate, and daughters having brothers have no superior rights of inheritance in their mother's landed property to what they have in their father's estate, with this exception, however, that when the parents have each an independant estate, the daughters, whether married in *Diga* or otherwise, have paraveny rights to equal shares with her brothers in their mother's estate.—*Mar. Judg. p.* 332 § 67.

It appears from Mr. Sawers' notes,* to have been a disputed question how the landed property of a person having children by several wives should be divided between the children, many of the chiefs gave their opinion that the property should be divided into two or more shares according to the number of wives by whom the deceased has left children and that each family should have one share, without reference to the number born of each bed; but the majority of the chiefs who were consulted seemed of opinion that the property should be divided equally among all the children of the different beds, share and share alike; and the two following cases are given by Mr. Sawers as being cited by two of the chiefs in support of the latter opinion " *Mewenewewe Mudianse* died intestate in the Kandyan King's time, leaving two sons by his first wife, and one son by his second wife, both wives being alive, but dwelling in separate *Wallauwes.* The case came before the King who decided that the lands should be equally divided among three brothers, share and share alike; the widows having their life interest reserved to them, in their respective children's shares, the case was renewed under the present Government, in consequence of one of the two sons of the first wife having died without issue, upon which the son of the second wife sued for a fresh division of their late father's property, or rather that his deceased half brother's share should be divided between himself and the surviving brother. But it was decided by the resident and chiefs, confirmed by the Governor, that no fresh division should take place, and that the share of the deceased brother should go wholly to his brother of the whole-blood." Again, " *Kaladgahapittia Mohottalle* left by his first wife one son, by his second wife two sons, and by his third wife two sons and a daughter, and when the children came to contest about a division of the property, the lands were divided equally

* See *Saw. Dig. p.* 5.

among the four sons, and the daughter was left to be supported out of the share of her two uterine brothers." This rule of division [*per capita* rather than *per stirpes*] certainly seems the most consonant to natural justice and has been acted upon by S. C;—In one case the deceased had left a son and daughter by his first wife, and one daughter by his second wife, the Court of Ratnapura adjudged the estate to be divided equally between the three children. The Court of the Judicial Commissioner decided that half the estate should be divided between the two children of the first marriage, and that the other half should go to the daughter by the second marriage. The S. C., before which the case was ultimately brought, after adverting to the conflicting opinions entertained by the chiefs on this point, decided in favour of the equal division among all three children, observing that "as far as this Court had been enabled to ascertain, the right of authority, founded both in opinion and precedent, is in favour of division among all the children of different marriages equally; that this practice would certainly seem to be more consonant with the principles of equitable distribution; that in the present case there was no reason founded on justice, why the daughter of the second marriage should enjoy a portion equal to that which was to be divided between her brothers and sisters, and that the justice of such distribution become, of course, stronger, when the children of one bed were still more numerous as compared with the other." No. 6754 Ratnapoora, mentioned supra: par: 53, on another point.—*Mar. Judg. p* 332. § 68

Where an estate is enjoyed undividedly by two or three brothers, having but one wife in common, on the death of one of the husbands, and the wife, or in the event of the wife being divorced after the death of one of the husbands, the children, being the issue of the joint connexion, can claim the share of their deceased father, to hold it independently of their surviving father or fathers. If one of the joint husbands should quit the connexion and take a wife for himself alone, and have issue also by her, and he die intestate, his share of the family property would be divided between the issue of his first wife which he had in joint connexion with his brother or brothers, and the issue of his sole wife, a moiety to each. Nor has the brother who capriciously detaches himself from a joint connexion, after the issue born under it, the power of depri-

ving his first family of the whole of his share of the family estate; one moiety at least of his share should remain with his first family, begotten under the common connexion of him and his brothers.* Mr. Sawers adds that "there is a difference of opinion on this point, some of the chiefs say, that the brother detaching himself from the joint connexion, under any circumstances, can deprive the issue of such connexion of any part of his property; but they admit that a man is liable to support his children begotten under joint marriage, and that if the means of the family be inadequate to their support he cannot deprive them of the whole of his share of the family estate, and quit the joint connexion to form a new one.—*Mar. Judg. p.* 334 § 69.

"A son, detaching himself from his family and forming a *Binna* marriage in the house of another, does not lose his right of inheritance to the estate of his parents, but if he neglect to sue for such right in his life time his children will have but a weak and doubtful claim on the estate of their father's parents for their father's share, generally speaking, such claims are considered to be destroyed by the neglect of the father;"† Mr. Sawers adds, "the chiefs are generally agreed that in order to maintain the rights of children begotten in a *Binna* marriage of the father in another's house the children must have been received as heirs presumptive in the house of their grandfather; that is, they must have been in the habit of visiting him, of paying him respect and rendering assistance to him as to their parent."—*Mar. Judg. p.* 336 § 75.

"The same rule above stated applies to a son adopted by an uncle or aunt, or by a stranger, to inherit the property of the adopting parents. The son so adopted does not thereby lose his right of inheritance in the estate of his parents who begat him, but a daughter so adopted would, unless she were an only child, lose her right of inheritance in her parent's estate, as much as if she had been given out in *Diga.*" To this position as regards the son, Mr. Sawers adds, "But the chiefs consulted are unanimously of opinion that the son so adopted will lose the right of inheritance in his natural father's estate, in the proportion which the extent of the adopted father's estate bears to what would have been his portion in his own

* See *Saw. Dig. p.* 5.
† See *Saw. Dig. p.* 6.

father's estate. And if the estate, which he acquires from his adopted parents be larger than the son's portion of his natural father's estates he will only be entitled out of the latter to such a share as would be sufficient to preserve to him the name of his ancestors. —*Mar. Judg. p.* 336 § 76.

The issue of an associated connexion inherit their father's parveny estate equally with the half-blood by a former or subsequent marriage of their father, unless the father should, in the first instance, have transferred or settled the whole or any part of such property on his first family, in which case, the second family gets the whole which the father had reserved to himself of his hereditary estate. But the property acquired under such marriage goes to the issue of such marriage respectively, unless the father should have made a division of his acquired property also, at the time of his separation from his first family, in which case, the last family would get the whole of that share of the acquired property which the father had reserved for himself. – *Mar Judg p.* 335 § 73.

A daughter married in *Binna*, quitting her parent's house with her children to go and live in *Diga* with her husband, before her parent's death, forfeits thereby for herself and her children, the right to inherit any share of her parent's estate [she having at the time a brother or a *Binna* married sister] unless one of the children be left in her parent's house. Four of the Chiefs, Mr. Sawers adds, are of opinion that the daughter previously married in *Binna* (1) may preserve for herself and her children her own and their claim on her parent's estate, by visiting him frequently and administering to his comfort and specially by being present, nursing and rendering him assistance in his last illness, and this would especially be the case where there were two daughters and no sons, either in re-establishing the right of one to the entire estate against the other daughter married in *Diga*, or for half of the estate, if the other daughter be married in *Binna*. But if there should be a son besides these two daughters under the above circumstances, and he living at

(1) *And afterwards going to live with her husband in Diga.* Sawers must have intended these words to be understood, because otherwise, the rights of the *Binna* married daughter would have remained unimpaired, and would have stood in no need of this special mode of preservation.

home; in that case the son or his heirs would get half the estate, and the other moiety would be divided between the two daughters or their heirs. (2) But should the son have been living out in *Binna*, and the parent have been depending on his daughters and their husbands for assistance and support, in that case he would only be entitled to one third, and the daughters or their children to one third each —*Mar. Judg p.* 329. § 57.

On this branch of the subject the following case from Madewelletenne was decided in 1834. A father dying about 1814 left six pelas of land, and on his death bed gave a Talpot to his son, the Defendant, telling him to support his mother to whom he gave two other Talpots, and who took the produce of one of the pelas till her death, which happened about 1826: from that time the defendant, her son, took the produce of this pela as well as of the other five, the present action was brought for a share of the land by a daughter who had been married in *Diga*, but who it appeared had frequently resided at her father's house, where several of her children were born, it further appeared that she and her children were in a state of destitution. The Talpots given to the mother were not to be found; in his answer, the defendant stated with great particularity the division made by his father of his lands, alleging all those which he now possessed had been bestowed on him by his father, and that his sister, the plaintiff, had forfeited those which had been given to her for non-performance of Government services, but of this he offered no proof. The Assessors in the original Court were of opinion that the plaintiff, in consideration of her distressed circumstances, was entitled to the pela which her mother had enjoyed,—the Judicial Agent, that she was only entitled to support her for life, but on reference to the Court of the Judicial Commissioners (this being before the new charter came into operation) that Court decreed, that she was not entitled to anything. On appeal to the S. C., it was decreed that the plaintiff be put into

(2) Mr. Sawers, it is presumed, means that the other moiety would be divided between the two daughters, provided both had rendered assistance, or if one only assisted, that the other was married in *Binna*; for if one be married in *Diga* and render no assistance &c., it seems clear that she could have no claim, and the estate would in such case be divided between the son residing in the house of his parents, and the assisting daughter.

possession of the pela possessed by her mother till her death; the S. C. adopted the opinion of the Assessors in the Court of Madewelletenne for the following reasons: Independently of the state of destitution in which it appears that the plaintiff now is, and which of itself would entitle her to some assistance from the estate of her deceased parents, it appears that, though she was married in *Diga*, she always kept up a close connection with her father's house, in which indeed three of her children were born; another reason is, that the defendant, although he undertook to assert in his answer that the plaintiff had received a share of the paternal lands which he even specially described, yet has not shewn that she did receive any part thereof; again it appears that the father, on his death bed, gave one Talpot to the defendant, and two others to his wife, what has become of those two latter olas does not appear, but it is not improbable that one of them may have been intended for the plaintiff, more especially considering the frequency of her visits to the paternal residence." No. 590 Madewelletenne, 3rd May, 1834.—*Mar. Judg. p.* 329 § 58.

A daughter, by conduct which brings disgrace upon her family, would destroy her parveny right of inheritance in the estate of her parents, but still she would have a right of support from the estate of her parents and could demand the same at law from the brothers. —*Mar. Judg. p* 331 § 62 *

If a daughter bear children in the house of her parents, without having an acknowledged husband, such children would have a doubtful or weak claim to any share of their maternal grandfather's property, and must depend chiefly on the good will of their uncle or uncles for support, and a provision out of the grandfather's estate.—*Mar. Judg. p.* 331 § 61.†

"Daughters must accept the husband chosen for them by their parents, or in the event of the parents being dead by their brothers, and must go out with such husbands in *Diga*; but in the event of such husband turning out badly, disinheriting his children, and compelling the wife to return to her father's house, the brothers are bound to make provisions for their unfortunate sister and her children out of her father's estate."—*Mar. Judg. p.* 331 § 63 ‡

* See *Saw. Dig. p.* 3.
† See *Saw. Dig. p.* 3.
‡ See *Saw. Dig. p.* 4.

"Grandchildren, (whether the children of a son or daughter) have the same right of inheritance to their grandfather's estate that their deceased parents would have had, if he or she had survived; that is, they are entitled to his or her share, and great grand. children in like manner inherit through their deceased parents."—*Mar. Judg. p.* 332 § 64.*

"If a daughter have unauthorised intercourse with a paramour in her father's house, the children of such intercourse have no right of inheritance in their maternal grandfather or grandmother's property, but if the father be known, and the children be acknowledged by him, they would have a claim of inheritance on his *parveny* property, provided the paramour were of equal rank and degree with the mother."—*Mar. Judg. p.* 332 § 66.†

Uterine brothers and sisters, though born to several fathers, have all equal rights of inheritance to their mother's peculiar estate."—*Mar. Judg. p* 336 § 74.‡

"A son becoming a priest thereby loses all right of inheritance in the property of his parents, because to take the robe is to resign all worldly wealth. Nor shall he be restored to his right of inheritance by throwing off the robe after his father's death, unless he shall have done so at the request of his brother, or by the unanimous request of his brothers, as the case may be, in which event, he will have a right to that share of his parent's property which would have fallen to him, had he never taken the robe. But should one brother, without the consent of his other brothers, being laymen, induce the brother, a Priest, to throw off the robe, then that brother shall provide for the *Sewralle* out of his own share of the property solely; and the *Sewralle* shall have no right to demand any portion of the shares of his other lay brothers. But should a priest be stripped of his robes for some violation of the rules of his order, or should he throw it off from caprice, ho has, in either case, a right to subsistence from the estate of his parents."§ In a case from Ruanwelle the Plaintiff claimed lands in right of his associated fathers, four in number, all of whom were dead; it appeared that after the death of the Plaintiff's mother, some of the fathers had married a second wife, the defendant, who had remained in

* See *Saw. Dig. p.* 4.
† See *Saw. Dig. p.* 4.
‡ See *Saw. Dig. p.* 6.
§ See *Saw. Dig. p.* 7.

possession of the lands since the death of her last surviving husband,—that the Plaintiff had become a priest in the Maritime Provinces, and had been for some years absent from his own country, during which period the widow had performed the *Rajakarea* and that he had lately returned, thrown off his priest's robes, and instituted this claim. The second and third Assessors were of opinion that the plaintiff was entitled, as heir to his fathers: The D. J. and the first Assessor considered that the defendant ought to retain possession for her life, and that at her death the lands should go to the plaintiff, and it was so decreed accordingly. And on appeal to the S. C. this decision was affirmed. No. 2248 Ruanwelle, 27th May, 1835.—*Mar. Judg. p.* 337 § 77.

The foregoing rules of the Law of inheritance must be understood to apply only in cases where the caste of the parents has been equal, for the children of a wife of inferior caste to that of the husband cannot inherit any part of the *parveny* or heriditary property of the father that has descended to him from his ancestors, as long as a descendant, or one of the pure blood of those ancestors, however remote, remains to inherit. But the issue of the low caste wife can inherit the lands acquired by their father, whether by purchase or by gift from strangers; and should no provision of this kind exist for the children of a low caste wife, they will, in that case, be entitled to temporary support from their father's heriditary property."—*Mar. Judg. p* 338 § 78.*

"Failing immediate descendants, that is, issue of his own body by a wife of his own or of higher caste, a man's next heir to his landed property [reserving the widow's life interest] is his father, or if the father be dead, the mother, but for a life interest only," [this limitation to a life interest seems, however, to be in contradiction to what will be stated in par. 82 and 85, by which the mother is stated to be absolute heiress at law to her children dying without issue, and to have the power of disposal of the father's *parveny* estate, which she inherits through them] "and on the same conditions on which she holds her deceased husband's estate, viz: in trust merely for her children [and this limitation to a trust, or life interest, seems to apply to the father equally as to the mother, in the case of

* See *Saw. Dig. p.* 7.

acquired property,] if the father and mother be both dead, the brother or brothers and their sons, and failing brothers and their sons, the sister or sister's sons succeeded.—*Mar. Judg. p.* 338 § 79 *

The mother is heir to her children even in the *parveny* property of her deceased husband through them. But if she die intestate, the estate will revert to her husband's family whose *parveny* property it was, with this exception, that if the mother has children, either by a former or subsequent husband, these children being the ultimate brothers and sisters of the children, through whom she inherited the estate, will inherit the same from her; and children of the same mother by different fathers are reciprocally heirs to each other, after the children of the whole blood have failed. But if the mother has been divorced by any of her husbands, the children born to other husbands cannot inherit the property of the children whom she had borne to the divorcing husband.—*Mar. Judg. p* 339 § 82 †

If a wife die intestate, leaving a son who inherits her property, and that son die without issue, the father has only a life interest in the property which the son derived from or inherited through his mother. And at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and, failing them, to the son's nearest heirs in his mother's family. —*Mar. Judg p.* 340 § 83 ‡

With respect to the father's property, the right of inheritance of the half blood is postponed to that of brothers and sisters of the whole blood. For example. A has by his first wife two sons and a daughter, and by his second wife, two sons, and dies. On the death of one of the sons of the first bed without issue no part of his property would go to the children of his second bed, or half blood; but the brother and sister of the whole blood would inherit the whole of the deceased's property. On failure, however, of the brothers and sisters of the whole blood and their issue, the brothers and sisters of the half blood are then to inherit.—*Mar. Judg. p.* 340 § 84 §

The following is said to be the exposition of *Doloswelle Dissave* of Saffragam: "the right of inheritance of the uterine children of the half blood is postponed to that of paternal uncles and aunts: and

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* See *Saw. Dig. p.* 8. ‡ See *Saw. Dig. p.* 9.
† See *Saw. Dig. p.* 9. § See *Saw. Dig. p.* 9.

their issue, except in respect to the mother's property. For example, *Lokuralle* marries *Kallu* and has issue *Tikiralle*, *Lokuralle* dies and his widow is taken to wife by *Sirimalhamy* and has issue, *Tikiralle* dies [without issue] and the property which he inherited from his father *Lokuralle* reverts to the brothers and sisters of *Lokuralle*, and does not go to the issue of *Sirimalhamy*, though they are of the half blood with *Tikiralle*, being children of the same mother." This, however, goes on the supposition that *Kallu* the mother is dead, for as the mother is the heir of her children (par: 82) the property of *Tikiralle*, if his mother *Kallu* had survived him, would have become her absolute property, and entirely at his disposal.—*Mar. Judg p* 340 § 85.*

If a son acquire independent property in his father's life time and die, leaving issue, before his father, his property goes to his widow and children. But his father if destitute would be entitled to maintenance out of the estate of his deceased son, but would have no deeper interest in it, nor could he object to the widow and children of his deceased son selling the estate, though such sale would destroy the means of maintaining him. If the son leave an only daughter, the father would have the right to possess the acquired estate of his deceased son, but he could not dispose of it, in any way prejudicial to the *parveny* right of inheritance of the daughter to her father's property.—*Mar. Judg. p.* 343 § 92.

Sisters have a right of maintenance from their parents' estate in the event of their becoming destitute by the misfortune or bad conduct of their husbands. Nor is this right destroyed by the sale of the parental estate by the brothers, for any person purchasing such an estate, without the concurrence of sisters who may have such claim upon it, would be liable to the sisters of the seller for the same support out of the estate as their brother would have been bound to afford them, in the event of their becoming destitute, and the same obligation would be upon the holder of the estate, in the event of its passing from the brother's son to his uterine brother by a different father.—*Mar. Judg. p.* 343 § 91.†

If a person die childless, but leaving parents, brothers and sisters, the property which the deceased may have received from his or her parents reverts to

* See *Saw. Dig. p.* 10. † See *Saw. Dig. p.* 12.

them respectively [if from the father, to the father, if from the mother to the mother] and his acquired property, whether land, cattle or goods, also goes to his parents, but only the usufruct of it. The parents cannot dispose of such acquired property by sale, gift or bequest, but it must devolve on the brothers and sisters, who, however, have only the same degree of interest in their deceased brother's acquired property that they have in their deceased parent's estate, ultimately it is divided equally among the brothers of the whole blood of the deceased, or their sons according to what would have been their father's share; failing brother's sons, it goes to sisters of the whole blood or their sons, failing them, to the brothers of the half-blood, uterine, and their children; failing them, to the sisters of the half-blood, uterine, and their children; failing both brothers and sisters of the half-blood uterine and their children, to brothers of the half-blood by the father's side and their children, next to sisters of the half-blood, by their father's side and their children, next to the mother's sister's side, that is to say, the mother's sister's children [see the latter part of par. 91] failing them, to the mother's brothers and their children, next to the father's brothers, and their children, and, failing them, to the father's sisters and their children.—*Mar. Judg. p.* 344 § 96.*

The father is not the heir of the property of his children born in *Binna* marriage, which they have acquired through their mother; the maternal uncles or next of kin on the mother's side being the heir to such property, but the father will succeed to such children's property otherwise acquired.—*Mar. Judg. p.* 344 § 97.†

If a man die leaving relations on his mother's side, but none on his father's side, his father's land will pass to his mother's family, his widow, if he left one, having a life interest in the property.—*Mar. Judg. p* 345 § 99 ‡

Sannasses and title deeds of all descriptions by the possessors of which lands are held "*Patta condoes*," by which the family designation or title is preserved, as also all articles received as royal gifts follow the des-

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* See *Thom. Inst. Vol.* 11. *p.* 648. See also *Saw. Dig. p.* 13.

† See *Thom. Inst. Vol.* 11. *p.* 649. See also *Saw. Dig. p.* 14.

‡ See *Thom. Inst. Vol.* 11. *p.* 649. See also *Saw. Dig. p.* 14.

cent of the land, and are considered the common property of the heir.—*Mar. Judg. p.* 345 § 100.*

Persons incapable of inheriting are 1st such as have assaulted and struck or wounded their parents; 2ndly such as have been discarded by their parents for shameful conduct; but mental or bodily infirmities do not disqualify from inheritance.—*Mar. Judg. p.* 345 § 101.†

Brothers and Sisters.

3. Where an estate is enjoyed undividedly or otherwise by three brothers, two of whom are married to one wife, while the third brother has a separate wife, in the event of one of the family or associated brothers dying without issue, the other brother with whom he had the joint wife shall be his sole heir, and the brother having a separate wife shall have no share of such demised brother's property of any land.—*Mar. Judg. p* 335 § 70.‡

The acquired property of one associated brother, dying without issue, goes to the other associated brother; but the property which the deceased had received from either of his parents would revert to that parents and associated brothers, being cousins or strangers in blood to each other, are reciprocally the heirs of each other, if either die without issue, to the property of all kind which the deceased may have acquired during the association; but not to the property which the deceased may have received from his parents or brothers or sisters, or which he may have inherited in any way from his own family.—*Mar. Judg. p.* 335 § 71. §

Should an associated husband die leaving children by a former single marriage, such children would be his heirs, except to the property acquired during the association, which property would go to his associate. —*Mar. Judg. p.* 335 § 72. ||

The chiefs are agreed that a sister's son had not a preferable right to the brother's daughter, unless he

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* See *Thom. Inst Vol.* 11. *p.* 650. See also *Saw. Dig. p.* 14.

† See *Thom. Inst. Vol.* 11. *p.* 650. See also *Saw. Dig. p.* 14.

‡ See *Thom. Inst. Vol.* 11. *p.* 638. See also *Saw. Dig. p.* 5.

§ See *Thom. Inst. Vol.* 11. *p.* 638. See also *Saw. Dig. p.* 6.

|| See *Thom. Inst. Vot.* 11. *p.* 639. See also *Saw. Dig. p.* 6.

has been adopted by his uncle, and therefore that failing a brother's son the property should be divided between the sister's son and the brother's daughter. But should the nephew have been neglected while the uncle was instrumental in procuring a *Binna* husband for his niece, and appearing otherwise to take a paternal solicitude about his niece, in such case she would be her uncle's sole heiress rather than the nephew, being a sister's son.—*Mar. Judg. p* 338 § 80.*

The property derived from the father goes to the half brothers on the father's side, in preference to the half brothers on the mother's side, for example; A has a son by his first wife, and another son by his second wife, and dies, and his estate is divided, his widow marries again, bears children to her second husband, and dies, her son by A's children inherits in preference to his mother's children by her second husband. "Mr. Sawers adds that *Deligama D. Nilleme* alone holds the contrary to be law, viz: that uterine children have a preference to the brothers or sisters of the half-blood by the father's side, though the property may have originally been the father's parveny." —*Mar. Judg. p* 241 § 86 †

"Two half brothers associated with one wife are heirs reciprocally to each other in preference to brothers of the whole blood. Suppose A leaves two sons by his first wife, and two sons by his second wife, at his death his property is equally divided among the four sons. If a son of the first bed becomes the associated husband of the same wife with a son of the second bed, these two half brothers would inherit from each other, unless the association be entirely dissolved before the death of either of them."—*Mar. Judg. p.* 341 § 87 ‡

"Sisters of the whole blood, though given out in *Diga*, succeed in preference to brothers of the half blood.—*Mar. Judg. p.* 341 § 89 §

To an estate coming from the mother the maternal cousin will succeed before the paternal cousin, as will appear decided in the following case of *Deyakelena*.

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* See *Saw. Dig. p.* 8.

† See *Thom. Inst. Vol.* 11. *p.* 644. See also *Saw. Dig. p.* 10.

‡ See *Thom. Inst. Vol.* 11. *p.* 645. See also *Saw. Dig. p.* 10.

§ See *Thom. Inst. Vol.* 11. *p.* 645. See also *Saw. Dig. p.* 12.

wela Unanse v. *Boange Nilleme*. The facts of that case are stated to be as follows: *Watapola Mahatmea*, having a husband in *Binna* had three daughters, among whom her estate was divided; the eldest married *Dehigame Angemulle Nilleme*, and had a son who succeeded to his mother's property, but becoming a priest he consequently had no issue, the Plaintiff claimed the share of this son on behalf of the temple, which claim was of course set aside. The defendant claimed as son of the third daughter, *Watapola Mahatmea*; a third claim was set up by a cousin of the last proprietor, the Priest, by the father's side, *Dehigame Angemulle Nilleme*, and the claimant's father having been brothers, and he contested that as the property had been the absolute property of his cousin, the priest, and as he the claimant was the paternal cousin of that person he had a preferable claim to be his heir over the defendant, who was only maternal cousin to the priest. But the chiefs who sat on the trial, as well as those subsequently consulted, were unanimously of opinion that as the land in dispute had come to the son of *Dehigame Angemulle Nilleme*, through his mother, it must revert to the descendants of the first proprietor *Watapola Mahatmea*, viz: to the defendant, and the issue of the second and third daughter of *Watapola Mahatmea*. Sir John D'Oyly's notes say "If a man die without father or mother land derived from either reverts to their relations respectively within three generations, and in failure of such it goes to the crown."—*Mar. Judg. p.* 341 § 90.

The chiefs say that if a deformed sister for whom a suitable match cannot be got in *Diga*, get herself a suitable husband to live with her in *Binna*; the brothers must give up to her a due portion of her parents' estate according to the number of children; which portion she can dispose of as she thinks fit, but should she die childless and intestate her share reverts to her brothers and does not go to her husband.—*Mar. Judg. p* 344 § 95.

When a person dies intestate, leaving no nearer relations than first cousins, called brothers and sisters, his or her acquired property goes in equal shares to such cousins by the father's and mother's side, that is to say, to the children of the father's brothers and to the children of the mother's sister or sisters, share and share alike.—*Mar. Judg. p.* 345 § 98.

Nephews and Nieces.

4. "Nephews and nieces of the whole blood succeeded before the brothers of the half blood."—*Mar. Judg. p.* 341 § 88.*

Nephews of the whole blood, being sons of the several brothers, share alike in the landed estate of an uncle dying childless, without respect to the numbers of each brother's family. "Thus, if one brother leaves one son, and another brother three sons, the lands of the third brother dying without issue would be divided into four shares, one to each of his four nephews. But if one of the first mentioned brothers were still alive at the death of the childless brother, such surviving brother would take a moiety of the childless brother's estate, and the other moiety would be divided among the children of the other deceased brother. At the death however of such last surviving brother, if he should not have disposed of his moiety of his deceased childless brother's portion, by sale, gift, or bequest, a fresh division of the childless brother's estate will take place among his nephews or their respective heirs, as if his brother had not survived him, that is, the nephew's side, all share alike in the estate of their deceased childless uncle; Mr. Sawers adds: "It is held that the children of brothers are the nearest of kin to a man after his own children, and that the children of his sisters are of the same affinity to each other that the children of brothers are to each other; and that they cannot intermarry, being in fact called and considered brothers and sisters; but it is held that there is so little affinity of blood between the children of a brother and those of a sister, their custom makes their intermarriages the most approved connexion. The son of the eldest brother has a sort of vested right to have for his wife his cousin, the eldest daughter of his father's eldest sister, and the connexions of the most respectable families often run in this way, from generation to generation."—*Mar. Jadg. p.* 342 § 91.

Widows and Widowers.

5. When a man dies intestate his widow and children are his immediate heirs, but the widow, *though* she had the chief control and management of the landed estate of her deceased husband, has *only* a life interest therein and at her death it is to be divided among the sons, excepting where there is a daughter, or daughters married in *Binna*; these or rather their children have the same right to a share of their

* See *Saw. Dig. p.* 11.

father's lands as they ;—but on this subject Mr. Sawers adds under the head "widows." The widow has no right to dispose of her husband's lands contrary to what the law directs although she has the usufruct of them, unless she be thereto specially authorized by her husband as a means of securing at least the dutiful obedience of his children ; this is a common case, but if a widow, being barren, be the husband's paternal aunt's daughter, she inherits the acquired lands, next to full brothers." As to the widow's power to mortgage the land, in certain cases, *vida infra* on the subject of the debts due and mortgage ; Par : 146.—*Mar. Judg. p.* 324 § 48.*

Soon after the Kandyan districts came under the appellate jurisdiction of S. C., a case was brought up in appeal, in which this limitation of the rights of the widow to a mere life interest came in question. A widow, finding herself excluded altogether from the estate of her late husband, instituted a suit against the representatives, and on their admitting her claim as widow, obtained a decree 11th June, 1824, by which certain fields, forming about one-sixth of the estate, were awarded to her in full ownership ; and in this decree the heir acquiesced, without appeal. In May 1829, the widow, in consideration of assistance, transferred these fields to one of her children by her deceased husband, to the exclusion of the rest, and on her death in 1833, the present action was brought by the excluded children, contrary to Kandyan law. The Court of the Judicial Agent considered it unnecessary to hear evidence, and decided the case on the documents produced, viz : the decree of 1824, and the deed of 1829. The first Assessor was of opinion that the widow had obtained an absolute right to the fields and could therefore dispose of them by will. The second Assessor considered that supposing the widow to have obtained an absolute right under the decree, still she ought to have shewn in the deed of transfer some reason for disinheriting her other children, or should, at least, have expressed her intention so to do. The Judicial Agent was of opinion that the meaning of the decree must have been, that the widow should get no more than a life interest in the fields, which at her death ought to revert to the heirs generally, and that though a distinct share had been assigned to her, it

* See *Saw. Dig. pp.* 1. 14. 23.

could not have been intended to give her the power of alienation, as her husband had died intestate. It was, therefore, decreed that the Notarial deed should be set aside, and that the land in dispute be held by all the sons in *Tattoomara*, like the rest of the property. The S. C, however, on the case coming before it in appeal referred the case back to the D. C., to receive proof of the Notarial instrument [vide supra: par: 112] of 5th May, 1829, unless it should be admitted by the plaintiffs, and also proof of the assistance and support rendered by the defendant to the mother of the parties, in fulfilment of the conditions of that deed. There is nothing "the judgment observed" in the decree of 1824 to limit the right of the widow to a life interest, unless, therefore, such a decree would have been contrary to law, there is no reason to construe it in that limited sense. The general rule, it is true, is that a widow has only a life interest in the estate of her deceased husband, but then she is supposed to have the chief superintendence and control of the whole estate for her life. Now here she was deprived of these advantages and was obliged to sue her sons for her portion as the means of supporting herself. They admitted the justice of her claims, and accordingly the court awarded her, not a life interest in the whole estate, but a part which it appears she had possessed before, and that part was decreed to her without restriction or limitation. If the sons had been dissatisfied with this unqualified award they should have appealed against it.—Not having done so, and having admitted the justice of their mother's claim it must be taken as an actual division and separation of the share so allotted, and therefore that she had the right of disposing of it, or at least of directing to which of her children it should go. For it is to be observed that she does not attempt to alienate it from the family of her late husband; the answer to the objections of the second Assessor is, that she *does* give a reason for so disinheriting the other children, or rather for the preference which she gives to the defendant, by saying, in consideration of support rendered and to be rendered &c. [As to the power of disposing property away from the heir-at-law, see the following paragraph.] If, therefore, the defendant shall appear to have really and *bona fide* fulfilled his engagement of supporting his mother, he ought to be considered entitled to retain possession of the land in question in

pursuance of the Notarial deed, supposing that instrument to be duly proved. Evidence was accordingly gone into before the D. C., and the deed and assistance being both established, the S. C., on the proceedings being returned, with the evidence so taken, decreed that the defendant be confirmed in the possession of the land awarded to him by the deed from his mother, No. 7044, Ratnapoora, 26th October, 1833, and 23rd July, 1834.—*Mar. Judg. p.* 342. § 49.

"A widow, of a husband dying childless, has the same life interest, and that only in the husband's landed property, whether heriditary or acquired, as the widow of a husband having issue, but if the widow be a second wife with issue, and there be issue by a former wife, the widow or widows must depend upon the shares of their children, and if the share of one of the widows should be insufficient for her and their support, the widow shall have a temporary allowance out of the other share."—*Mar. Judg. p* 326 § 50 *

"A widow loses her right and life interest in her husband's estate by taking a second husband, contrary to the wish of her first husband's family, or by disgraceful conduct, such as glaring profligacy or adultery, or by squandering the property of her deceased husband: any one of these acts being proved against her by the children would subject the widow to expulsion from the house of her late husband, and deprive her of any benefit from his estate."—*Mar. Judg. p* 326 § 51.†

"A widow having the administration of her deceased husband's estate may, during the minority of her children, mortgage the landed property, if necessity require it. But this must be clearly to satisfy the necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt; but in all cases, where the children are as much as 14 or 15 years old, their consent is necessary to render such mortgage valid against them and their lands."—*Mar Judg. p.* 359 § 14.‡

"A widow may appoint a guardian for her child or children, with the right to inherit such children's property, in the event of their dying in minority and without issue, but such guardian, appointed by the

* See *Saw. Dig. p.* 1. † See *Saw. Dig. p.* 2.
‡ See *Saw. Dig. p.* 33.

mother, will not inherit the property, which the ward inherits through his or her father, which will revert to the father's family."—*Mar. Judg. p.* 352 § 124.*

SECTION 4.

(*From Thomson's Institutes.*)

1. Marriage not valid unless registered, and parties are of age.—2. Exception.—3. Prohibited marriages.—4. Requirements of a lawful marriage.—5. Grounds of divorce.—6. Children how ligitimated.—7. Husband and wife.—8. Parents and children.—9. Brothers and sisters.—10. Nephews and nieces.—11. Widows and widowers.

Marriage not valid unless registered, and parties are of age.

1. No future marriage shall be valid unless registered and solemnized in the presence of the registrar for the district, and at such house or other place as the Government Agent shall from time to time direct (§), nor to which the male party is under sixteen years of age, or the female under twelve years (§ 3.)—*Thom. Inst. Vol.* 11. *p.* 609.†

Exception.

2. All existing marriages, if contracted according to the laws, institutions and customs in force amongst the Kandyans, are valid (§ 28.)—*Thom. Inst. Vol.* 11. *p.* 617.‡

Prohibited marriages.

3. No marriage is valid where either party is directly descended from the other: or where the female is the sister of the male, either by the full or the half blood, or the daughter of his brother, or of his sister by the full or the half blood, or a descendant from either of them, or the daughter of his wife by another father, or his son's, or grandson's, or father's, or grandfather's widow; or where the male is the son of the brother or sister of the female by the full or half blood, or a descendant from either of them, or the son of her husband by another mother, or her deceased daughter's, grand-daughter's, mother's, or grandmother's husband. Any marriage or cohabitation within the above enumerated degrees is incest, and punishable with im-

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* See *Saw. Dig. p.* 22.
† See Ord. No. 13 of 1859 § 2 and 3.
‡ The 29th Section is repealed by the Ord. No. 8 of 1861. See *Thomson Vol.* 11. *p.* 619.

prisonment with or without hard labour for a period not exceeding one year (§ 5) *Thom. Inst. Vol.* II. *p.* 610.

Any marriage, civil or religious, during the life of a former husband or wife is void, except where the party to the second marriage has been divorced, or where the first marriage shall have been decreed void. (§ 6).—*Thom. Inst. Vol.* II. *p.* 611.*

Requirements of lawful marriage.

4. The father, if living, of any male under twenty-one years, not being a widower, and of any female under sixteen years, not being a widow; or, if the father shall be dead, the guardian or guardians of the party so under age, lawfully appointed, or one of them; has authority to consent to, and to forbid such future marriage; and such consent is required for the marriage of a party under age, unless there is no person authorized to give consent. If the father, or the mother, guardian, or any one whose consent is necessary to the marriage, is *non compos mentis* or not in the Island, the person desiring to marry may apply to the judge of any court of record within the district in which such person resides, who may determine such application in a summary way: and if the marriage proposed shall appear to be proper, the judge may certify it to be so, and the certificate, unless set aside in appeal, is as effectual as if the father, mother, or guardian had consented to the marriage. (§ 4).—*Thom. Inst. Vol.* II. *p.* 610.†

Grounds of divorce.

5. No suit for divorce can be maintained, except upon the grounds of adultery by the wife after marriage, or of adultery by the husband after marriage, committed with any person within such degree of consanguinity as aforesaid, or of adultery by the husband accompanied with gross cruelty, or on the grounds of complete and continued desertion for the space of five years. The court may decree the dissolution of any existing marriage (unless the same shall have been registered, as provided by the 29th clause) on proof that the parties to the suit mutually consent to such dissolution (§ 31).—*Thom. Inst. Vol.* II. *p.* 617.‡

Children how legitimated.

6. Every marriage contracted or registered under the Ordinance renders legitimate any children procreated by the parties previous to their marriage; and

* See Ord. No. 13 of 1859 § 5 and 6. See also § 33 of the same Ord.

† See Ord. No. 13 of 1859 § 4.

‡ See Ord. No. 13 of 1859 § 31.

such children are entitled to the same rights as if they had been pro-created after marriage, provided that the children have not been born in adultery. (§ 32).—*Thom. Inst. Vol.* II. *p.* 618.*

Husband and Wife.

7. The husband is not the heir to his wife's landed parveny estate which she inherited from her parents, nor to her acquired landed property; that, on the contrary, the moment the wife dies, the husband loses all interest in her estate, which, if she has left no issue, reverts to her parents or their heirs; and that, though the wife is entitled to the entire possession of her deceased husband's estate, so long as she continues single and remains in his house, yet the husband must quit his wife's estate the moment she dies.—*Thom. Inst. Vol.* II. *p.* 643 †

A wife dying barren or without surviving children, all the property which she received from her parents reverts to them, or to her brothers and sisters, and their issue. The husband inherits all the property acquired during the coverture; but the property acquired under a former marriage, or when single, would go to her nearest of kin in her own family; but, failing brothers and sisters and their issue, the husband comes in before the wife's uncles or aunts and their issue.—*Thom. Inst. Vol.* II. *p.* 653.‡

If a wife and children are obliged to quit the husband's house from the means of subsistence failing to be sufficient for the whole family, this does not prejudice the right of inheritance of her or her children to the property of the husband.—*Thom. Inst. Vol.* II. *p.* 647 §

If a *Beena* husband contract a debt without the consent or knowledge of his wife, she is not liable to pay it. A *Diga* wife is liable to pay the debts of her deceased husband, whether she have inherited property from him or not. The husband is liable to pay such debts of his wife as she has contracted for the purposes of the family; but not such as have been unnecessarily contracted, and without the knowledge of the husband.—*Thom. Inst. Vol.* II. *p.* 655.||

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* See Ord. No. 13 of 1859 § 32.

† See *Mar Judg. p.* 339 § 81, see also *Saw. Dig. p.* 8.

‡ See *Mar. Judg. p.* 348 § 108, see also *Saw. Dig. p.* 16.

§ See *Mar. Judg. p.* 343 § 93, see also *Saw. Dig. p.* 12.

|| See *Mar. Judg. p.* 351 § 117, see also *Saw. Dig p.* 18.

8. The eldest son has no right to a better share of the estate of his parents than his other brothers and his sisters having *Binna* husbands,—*Thom. Inst. Vol.* I *p.* 630*. Parents and children.

If, however, a daughter, who has been given out in *Diga*, should afterwards return to the house of her parents, with the consent of her family, and there marry a *Binna* husband, the issue of this connection will have the same right of inheritance in the estate of their maternal grandfather or grandmother as the issue of her uterine brothers.—*Thom. Inst Vol.* I *p.* 632 †.

On failure of the issue of sons and of daughters married in *Binna*, a *Diga* married daughter would succeed ; but if she be dead, her father's brothers succeeded before her children ; and again, if the brothers be dead, the *Diga* daughter's children succeeded before the children of her father's brothers. On this point, Mr. Sawers observes, there appears to be a considerable degree of uncertainty ; but the chiefs seem pretty unanimously of opinion that where two brothers have possessed the family estate undividedly, the one brother would succeed to the other in preference to the other daughters married in *Diga* ; but where the family estate has been divided, and so possessed by the two brothers, the children of a *Diga* married daughter would succeed to their maternal grandfather before their grandfather's brothers ; and, even in the first instance, that is, where the brothers have possessed the estate undividedly, the children of the *Diga* married daughter, if they become destitute, but not otherwise, would have a right to claim support from their maternal grandfather's estate, though the parveny right to that

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* See *Mar Judg. p.* 327 § 52, also *Saw. Dig. p.* 3.

† See *Mar. Judg. p.* 328 § 54, also *Saw. Dig p.* 2.

[It is as well to notice here that, the rule of succession under the Kandyan law which the Supreme Court now recognizes is *per stirpes*, the doctrine of succession *per capita* having long since been overruled. This, however, only applies to *paternal* inheritance, the maternal being governed by the old doctrine *per capita*.—Ed.]

[Note by Justice Thomson.]—The plaintiff, as only child of A by his first marriage, is entitled to inherit one half of the lands; and the children of his second marriage are entitled to inherit the other half thereof, subject to his widow's claim to maintenance from such latter half, even if A is to be considered sole proprietor, from prescriptive right, to his brother's share. (4375, *D. C. Colombo*, No. 6, 25 *July*, 1844.)

estate would be in their grand-uncle, maternal grand-father's brothers.—*Thom. Inst. Vol* 11 *p.* 632.*

A daughter having a *Binna* husband in the house of her parents, her children have the same right of inheritance to the estate of their mother's brother; but if the children of the daughter having a *Binna* husband inherit any considerable landed estate from their father, in that case their share of their mother's family estate would be proportionately diminished.—*Thom. Inst Vol.* 11 *p.* 633.†

A daughter married in *Binna*, quitting her parent's house with her children to go and live in *Diga* with her husband before her parent's death, forfeits thereby, for herself and her children, the right to inherit any share of her parent's estate [she having at the time a brother or a *Binna* married sister], unless one of the children be left in her parent's house. Four of the Chiefs, Mr. Sawers adds, are of opinion that the daughter previously married in *Binna* may reserve for herself and her children her own and their claim on her parent's estate, by visiting him frequently and administering to his comfort, and especially by being present, nursing and rendering him assistance in his last illness; and this would especially be the case where there were two daughters and no sons, either in re-establishing the right of one to the entire estate against the other daughter married in *Diga*, or for half of the estate if the other daughter be married in *Binna*. But if there should be a son besides these two daughters under the above circumstances, and he living at home; in that case the son or his heirs would get half the estate, and the other moiety would be divided between the two daughters, or their heirs. But should the son have been living out in *Binna* and the parent have been depending on his daughters and their husbands for assistance and support, in that case he would only be entitled to one-third, and the daughters or their children to one-third each.—*Thom. Inst. Vol.* 11. *p.* 633.‡

A daughter, being the only child of a man's first, or second, or third marriage, will have equal rights with her brothers of the half blood in her father's estate, even if given out in *Diga*. But where there is an only daughter, or only daughter of one bed, though

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* See *Mar. Judg. p.* 328 § 55, also *Saw. Dig. p.* 2.
† See *Mar. Judg. p.* 328 § 56, also *Saw. Dig. p.* 3.
‡ See *Mar. Judg. p.* 329 § 57, also *Saw. Dig. p.* 3.

such daughters would have absolute or *parveny* rights in their shares, they would be entitled to shares inferior to those of their half-brothers; commonly, only half as much.—*Thom. Inst. Vol.* 11, *p.* 635.*

Daughters before marriage, or returning from a *Diga* marriage, have an equal claim for maintenance from the share of all their brothers, although of the whole or half blood, that is to say, from all the shares into which their parent's estate may have been divided. —*Thom. Inst. Vol.* 11. *p.* 635.†

If a daughter bear children in the house of her parents, without having an acknowledged husband, such children would have a doubtful or weak claim to any share of their maternal grandfather's property' and must depend chiefly on the good will of their uncle or uncles for support and a provision out of the grandfather's estate.—*Thom. Inst. Vol.* 11 *p.* 635.‡

A daughter by conduct which brings disgrace upon her family would destroy her parveny right of inheritance in the estate of her parents; but still she would have a right to support from the estate of her parents, and could demand the same at law from the brothers.—*Thom Inst. Vol.* 11. *p.* 636.§

Daughters must accept the husband chosen for them by their parents, or, in the event of the parents being dead, by their brothers, and must go out with such husbands in *Diga*; but, in the event of such husband turning out badly, disinheriting her children, and compelling the wife to return to her father's house, the brothers are bound to make provision for their unfortunate sister and her children out of her father's estate.—*Thom. Inst. Vol.* 11. *p.* 636.||

Grandchildren, whether the children of a son or daughter, have the same right of inheritance to their grandfather's estate that their deceased parents would have had if he or she had survived; that is, they are entitled to his or her shares: and great grandchildren, in like manner, inherit through their deceased parents. —*Thom. Inst. Vol.* 11. *p.* 636.¶

The only daughter of a deceased brother, or of a sister having had a *Binna* husband, is entitled to her parent's share of the family estate; nor does she lose

* See *Mar. Judg. p.* 331 § 59, also *Saw. Dig. p.* 3.
† See *Mar. Judg. p.* 331 § 60, also *Saw. Dig. p.* 3.
‡ See *Mar. Judg. p.* 331 § 61, also *Saw. Dig. p.* 3.
§ See *Mar. Judg. p.* 331 § 62, also *Saw. Dig. p.* 3,
|| See *Mar. Judg. p.* 331 § 63, also *Saw. Dig. p.* 4.
¶ See *Mar. Judg. p.* 332 § 64, also *Saw. Dig. p.* 4.

her right to such share by being married in *Diga* marriage by her grandfather or grandmother, in which case she would have a right of inheritance; but her being so given away by her uncles would not deprive her of her right of inheritance in her grandfather's or grandmother's estate.—*Thom. Inst. Vol.* 11. *p.* 636.*

If a daughter have unauthorized intercourse with a paramour in her father's house, the children of such intercourse have no right of inheritance in their maternal grandfather or grandmother's property; but if the father be known, and the children be acknowledged by him, they would have a claim of inheritance on his parveny property, provided the paramour were of equal rank and degree with the mother.—*Thom Inst. Vol* 11 *p.* 637 †

The same custom regulates the succession to the mother's as to the father's estate; and daughters having brothers have no superior rights of inheritance in their mother's landed property to what they have in their father's estate; with this exception, however, that when the parents have each an independent estate, the daughters, whether married in *Diga* or otherwise, have parveny rights to equal shares with their brothers in their mother's estate.—*Thom. Inst. Vol.* 11 *p.* 637.‡

Where an estate was enjoyed undividedly by two or three brothers, having but one wife in common, on the death of one of the husbands, and the wife, or, in the event of the wife being divorced after the death of one of the husbands, the children, being the issue of the joint connexion, can claim the share of their deceased father, to hold it independently of their surviving father or fathers. If one of the joint husbands should quit the connexion and take a wife for himself alone, and have issue also by her, and he die intestate, his share of the family property would be divided between the issue of his first wife, which he had in joint connexion with his brother or brothers, and the issue of his sole wife, a moiety to each. Nor has the brother, who capriciously detaches himself from a joint connexion after the issue born under it, the power of depriving his first family of the whole of his share of the family estate; one moiety at least of his share should remain with his first family, begotten under

* See *Mar. Judg. p.* 332 § 65, also *Saw. Dig. p.* 4.
† See *Mar. Judg. p.* 332 § 66, also *Saw. Dig. p.* 4.
‡ See *Mar. Judg. p.* 332 § 67, also *Saw. Dig. p.* 4.

the common connexion of him and his brothers.—*Thom. Inst. Vol.* 11 *p* 637.*

Should an associated husband die, leaving children by a former single marriage, such children would be his heirs, except to the property acquired during the association, which property would go to his associate. —*Thom. Inst Vol.* 11 *p.* 639.†

The issue of an associated connexion inherit their father's parveny estate equally with the half-blood by a former or subsequent marriage of their father, unless the father should, in the first instance, have transferred or settled the whole or any part of such property on his first family; in which case, the second family gets the whole which the father had reserved to himself of his hereditary estate. But the property acquired under such marriage goes to the issue of such marriage respectively, unless the father should have made a division of his acquired property also at the time of his separation from his first family; in which case, the last family would get the whole of that share of the acquired property which the father had reserved for himself.—*Thom. Inst. Vol.* 11 *p.* 639.‡

Uterine brothers and sisters, though born to several fathers, have all equal rights of inheritance to their mother's peculiar estate.—*Thom. Inst. Vol.* 11 *p.* 639.§

A son, detaching himself from his family, and forming a *Binna* marriage in the house of another, does not lose his right of inheritance to the estate of his parents; but if he neglect to sue for such right in his life time, his children will have but a weak and doubtful claim on the estate of their father's parents for their father's share: generally speaking, such claims are considered to be destroyed by the neglect of the father. In order to maintain the rights of children begotten in a *Binna* marriage of the father in another's house, the children must have been received as heirs presumptive in the house of their grandfather; that is, they must have been in the habit of visiting him, of paying him respect, and rendering assistance to him as to their parent.—*Thom. Inst. Vol.* 11 *p.* 639||

* See *Mar. Judg. p.* 334 § 69, also *Saw. Dig. p.* 5.
† See *Mar. Judg. p.* 335 § 72, also *Saw. Dig. p.* 6.
‡ See *Mar. Judg. p.* 335 § 73, also *Saw. Dig. p.* 6.
§ See *Mar. Judg. p.* 336 § 74, also *Saw. Dig. p.* 6.
|| See *Mar. Judg. p.* 336 § 75, also *Saw. Dig. p.* 6.

The same rule, above stated, applies to a son adopted by an uncle or aunt, or by a stranger, to inherit the property of the adopting parents. The son so adopted does not thereby lose his right of inheritance in the estate of his parents who begat him; but a daughter so adopted would, unless she were an only child, lose her right of inheritance in her parent's estate, as much as if she had been given out in *Diga*. But the son so adopted will lose the right of inheritance in his natural father's estate, in the proportion which the extent of the adopted father's estate bears to what would have been his portion in his own father's estate. And if the estate which he acquires from his adopted parents be larger than the son's portion of his natural father's estate, he will only be entitled, out of the latter, to such a share as would be sufficient to preserve to him the name of his ancestors. —*Thom. Inst. Vol.* 1.1 *p*. 640.*

A son becoming a priest thereby loses all right of inheritance in the property of his parents; because to take the robe is to resign all worldly wealth. Nor shall he be restored to his right of inheritance by throwing off the robe after his father's death, unless he shall have done so at the request of his brother, or by the unanimous request of his brothers, as the case may be; in which event, he will have a right to that share of his parent's property which would have fallen to him had he never taken the robe. But should one brother, without the consent of his other brothers, being laymen, induce the brother, a priest, to throw off the robe, then that brother shall provide for the *Sewralle* out of his own share of the property solely; and the *Sewralle* shall have no right to demand any portion of the shares of his other lay brothers. But should a priest be stripped of his robes for some violation of the rules of his order, or should he throw it off from caprice, he has, in either case, a right to subsistence from the estate of his parents.—*Thom. Inst. Vol.* 11 *p*. 641.†

The foregoing rules of the law of inheritance apply only in cases where the caste of the parents has been equal; for the children of a wife of inferior caste to that of the husband cannot inherit any part of the *parveny* or hereditary property of the father that

* See *Mar. Judg. p.* 336 § 76, also *Saw. Dig. p.* 7.
† See *Mar. Judg. p.* 337 § 77, also *Saw. Dig. p.* 7.

has descended to him from his ancestors, as long as a descendant, or one of the pure blood of those ancestors, however remote, remains to inherit. But the issue of the low-caste wife can inherit the lands acquired by their father, whether by purchase or by gift from strangers; and should no provision of this kind exist for the children of a low-caste wife, they will, in that case, be entitled to temporary support from their father's hereditary property.—*Thom. Inst. Vol.* 11 *p.* 641.*

Failing immediate descendants, that is, issue of his own body by a wife of his own or of higher caste, a man's next heir to his landed property (reserving the widows' life interest) is his father, or, if the father be dead, the mother; but for a life interest only [this limitation to a life interest seems, however to be in contradiction to what will be stated in p. 9 by which the mother is stated to be absolute heiress at law to her children dying without issue, and to have the power of disposal of the father's parveny estate, which she inherits through them], and on the same conditions on which she holds her deceased husband's estate, viz.: in trust merely for her children [and this limitation to a trust or life interest seems to apply to the father equally as to the mother, in the case of acquired property]; if the father and mother be both dead, the brother or brothers and their sons, failing brothers and their sons, the sister or sister's sons succeeded.—*Thom. Inst Vol.* 11 *p.* 642. †

A sister's son has not a preferable right to the brother's daughter, unless he has been adopted by his uncle; and therefore that, failing a brother's son, the property should be divided between the sister's son, and the brother's daughter. But should the nephew have been neglected while the uncle was instrumental in procuring a *Binna* husband for his niece, and appearing otherwise to take a paternal solicitude about his niece, in such case she would be her uncle's sole heiress rather than the nephew, being a sister's son. —*Thom. Inst. Vol.* 11 *p.* 642.‡

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* See *Mar. Judg. p.* 338 § 78, also *Saw Dig. p.* 7.

† See *Mar. Judg. p.* 338 § 79, also *Saw. Dig. p.* 8.

‡ See *Mar. Judg. p.* 338 § 80, also *Saw. Dig. p.* 8. [NOTE BY JUSTICE THOMSON]. By the Kandyan law, nephews and nieces of the whole blood succeed before nephews and nieces, as well as brothers even, of the half blood. (*Sawyer's Digest, p.* 27 : 971 *D. C. Seven Corles*, October 26th, 1836 : *Morg. D.* 101.)

The mother is heir to her children, even in the parveny property of her deceased husband, through them. But if she die intestate, the estate will revert to her husband's family, whose parveny property it was; with this exception, that, if the mother has children, either by a former or subsequent husband, these children, being the ultimate brothers and sisters of the children through whom she inherited the estate, will inherit the same from her. And children of the same mother by different fathers are reciprocally heirs to each other, after the children of the whole blood have failed. But if the mother has been divorced by any of her husbands, the children born to other husbands cannot inherit the property of the children whom she had borne to the divorcing husband.—*Thom. Inst. Vol.* 11 *p.* 643.*

If a son acquired independent property in his father's life time and die, leaving issue, before his father, his property goes to his widow and children. But his father, if destitute, would be entitled to maintenance out of the estate of his deceased son, but would have no deeper interest in it, nor could he object to the widow and children of his deceased son selling the estate, though such sale would destroy the means of maintaining him. If the son leave an only daughter, the father would have the right to possess the acquired estate of his deceasad son; but he could not dispose of it in any way prejudicial to the *parveny* right of inheritance of the daughter to her father's property.—*Thom. Inst. Vol.* 11 *p.* 647.†

Sisters have a right of maintenance from their parent's estate in the event of their becoming destitute by the misfortune or bad conduct of their husbands. Nor is this right destroyed by the sale of the parental estate by the brothers; for any person purchasing such an estate, without the concurrence of sisters who may have such claim upon it, would be liable to the sisters of the seller for the same support out of the estate as their brother would have been bound to afford them in the event of their becoming destitute; and the same obligation would be upon the holder of the estate in the event of its passing from the brother's son to his uterine brother by a different father.—*Thom. Inst. Vol.* 1 *p* 647. ‡

* See *Mar. Judg. p.* 339 § 82, also *Saw. Dig. p.* 8.
† See *Mar. Judg. p.* 343 § 92, also *Saw. Dig. p.* 11.
‡ See *Mar. Judg. p.* 343 § 94, also *Saw. Dig. p.* 12.

If a person die childless, but leaving parents, brothers and sisters, the property which the deceased may have received from his or her parents reverts to them respectively, [if from the father, to the father; if from the mother, to the mother]; and his acquired property, whether land, cattle, or goods, also goes to his parents; but only the usufruct of it. The parents cannot dispose of such acquired property by sale, gift, or bequest; but it must devolve on the brothers and sisters, who, however, have only the same degree of interest in their deceased brother's acquired property that they have in their deceased parent's estate; ultimately it is equally divided among the brothers of the whole blood of the deceased, or their sons, according to what would have been their father's share; failing brothers' sons, it goes to sisters of the whole blood, or their sons; failing them, to the brothers of the half blood, uterine, and their children; failing them, to the sisters of the half blood, uterine, and their children; failing both brothers and sisters of the half blood, uterine, and their children, to brothers of the half blood by the father's side, and their children; next, to sisters of the half blood by the father's side, and their children; next, to the mother's sister's side, that is to say, the mother's sister's children; failing them, to the mother's brothers and their children, next to the father's brothers, and their children; and, failing them, to the father's sisters, and their children.—*Thom. Inst. Vol.* II. *p.* 648.*

The father is not the heir of the property of his children born in *Binna* marriage which they have acquired through their mother, the maternal uncles or next of kin on the mother's side being the heir to such property; but the father will succeed to such children's property otherwise acquired.—*Thom. Inst. Vol.* II. *p.* 649.†

If a man die intestate, leaving neither widow nor children, his moveable property goes to his parents; failing them, to such of his brothers and sisters as have rendered him assistance and support on his death bed; failing them, to his next of kin, or those who have rendered them assistance, except in cases where the property is more than amounts to a fair recompense to the stranger who has rendered the deceased

* See *Mar. Judg. p.* 344 § 96, also *Saw. Dig. p.* 13.
† See *Mar. Judg. p.* 344 § 97, also *Saw. Dig. p.* 14.

assistance ; in which case, the stranger must be satisfied with a compensation out of the deceased's property, and the remainder goes to the next of kin as abovementioned ; failing parents and sisters and brothers, the nephews and nieces inherit according to the shares to which their parents would have been entitled ; and in this respect the children of brothers and sisters have equal rights ; and failing sisters and brothers and their children, the moveable property of the deceased will go to the uncle and aunts or their issue, on both father's and mother's side ; that is to say, one half to the kindred on the father's side, and one half of the kindred on the mother's side. But these rules apply only to the acquired property of the deceased ; since whatever he received through his mother will revert to the mother's family, and what came from or through his father will revert to his father's family.—*Thom. Inst. Vol.* II. *p.* 652.*

A wife dying, leaving a husband and children, her peculiar property of all descriptions goes to her children, and not to her husband.—*Thom. Inst. Vol.* II. *p.* 653 †

A wife dying barren or without surviving children, all the property which she received from her parents reverts to them, or to her brothers and sisters, and their issue. The husband inherits all the property acquired during the coverture ; but the property acquired under a former marriage, or when single, would go to her nearest of kin in her own family ; but, failing brothers and sisters and their issue, the husband comes in before the wife's uncles or aunts and their issue.—*Thom. Inst. Vol.* II *p.* 653 ‡

The mother is heiress to the acquired property of her children, dying unmarried and without issue, and that the same is entirely at her disposal. But should she die intestate, the property would go to the brothers and sisters of the whole blood equally, and, failing them, to the brothers and sisters of the half blood uterine.—*Thom. Inst. Vol.* II. *p.* 354.§

Lands as well as moveable property acquired by an unmarried woman, dying intestate and without issue, follow the above rules of succession ; but par-

* See *Mar. Judg. p.* 347 § 105, also *Saw. Dig. p.* 15.
† See *Mar. Judg. p.* 348 § 107, also *Saw. Dig. p.* 16.
‡ See *Mar. Judg. p.* 348 § 108, also *Saw. Dig. p.* 16.
§ See *Mar. Judg. p.* 350 § 111, also *Saw. Dig. p.* 17.

veny property goes to the nearest male relations only, of that side of the family from which she inherited.—*Thom. Inst Vol.* 11 *p.* 654.*

Property given to a concubine, or acquired by her, if she die intestate and without issue, follow the same rule of inheritance as the property of an unmarried woman; but if a concubine or a prostitute leave issue, such issu· will inherit their mother's property.—*Thom. Inst. Vol.* 11 *p.* 654.†

The debts of the deceased must be paid by them who inherit his or her property, according to the value of their respective shares. Debts of money, paddy, or grain, should be paid by those who inherit the lands. But if the moveable property of the deceased be large in proportion to the landed property, the heirs of the moveable property must pay a share of the debts, in proportion to the value of such property.—*Thom. Inst. Vol.* 11 *p.* 654.‡

It is a pious duty incumbent on sons to pay their parent's debts, although they may not have inherited any property from them.—*Thom. Inst. Vol.* 11 *p.* 655.¶

When the family of a man or woman has been separated and apportioned off [that is, it is to be presumed, the estate divided], and such man or woman has contracted a second marriage, the members of such separated family neither has a right to share in the estate of their parent at his or her death, nor are they liable for the debts of their parent contracted after the separation. The issue of the second marriage shall inherit the whole estate, and be liable for the debts: but the separation must have been complete and indubitable.—*Thom. Inst Vol.* 11 *p.* 655.§

A parent is not liable to pay the debt of a child, unless the debt have been contracted for the benefit of his parent's family. A father could not be taken in execution for his son's debt.—*Thom. Inst. Vol.* 11. *p.* 655.||

Grand children, whether the children of a son or daughter, have the same right of inheritance to their grandfather's estate that their deceased parents would have had if he or she had survived; that is, they are

* See *Mar. Judg. p.* 350 § 112, also *Saw. Dig. p.* 17.
† See *Mar. Judg. p.* 350 § 113, also *Saw. Dig. p.* 18.
‡ See *Mar. Judg. p.* 350 § 114, also *Saw. Dig. p.* 18.
¶ See *Mar. Judg. p.* 350 § 114, also *Saw. Dig. p.* 18.
§ See *Mar. Judg. p.* 351 § 118, also *Saw. Dig. p.* 18.
|| See *Mar. Judg. p.* 351 § 119, also *Saw. Dig. p.* 19.

entitled to his or her shares : and great grand children, in like manner, inherit through their deceased parents. —*Thom. Inst. Vol.* 11 *p.* 636.*

The property of a deceased person goes to the crown only when no kindred can be found to inherit (vide supra par 90), as the landed property goes to the crown.—*Thom. Inst Vol.* 11 *p.* 654.†

Brothers and Sisters.

9. Where an estate is enjoyed undividedly, or otherwise, by three brothers, two of whom are married to one wife, while the third brother has a separate wife, in the event of one of the family or associated brothers dying without issue, the other brother, with whom he had the joint wife shall be his sole heir, and the brother having a separate wife shall have no share of such demised brother's property of any land.—*Thom. Inst. Vol.* 11 *p.* 638.‡

The acquired property of one associated brother, dying without issue, goes to the other associated brother ; but the property which the deceased had received from either of his parents would revert to that parents and associated brothers, being cousins or strangers in blood to each other, are reciprocally the heirs of each other ; if either die without issue, to the property of all kind which the deceased may have acquired during the association ; but not to the property which the deceased may have received from his parents, or brothers, or sisters, or which he may have inherited in any way from his own family.—*Thom. Inst. Vol.* 11 *p.* 638.§

Two half brothers associated with one wife are heirs reciprocally to each other, in preference to brothers of the whole blood. Suppose A leaves two sons by his first wife, and two sons by his second wife ; at his death, his property is equally divided among the four sons. If a son of the first bed becomes the associated husband of the same wife with a son of the second bed, these two half brothers would inherit from each other, unless the association be entirely dissolved before the death of either of them.—*Thom. Inst. Vol.* 11 *p.* 645. ||

Sisters of the whole blood, though given out in

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* See *Mar. Judg. p.* 332 § 64, also *Saw. Dig. p.* 4.
† See *Mar. Judg. p.* 348 § 109, also *Saw. Dig. p.* 16.
‡ See *Mar. Judg. p.* 335 § 70, also *Saw. Dig. p.* 5.
§ See *Mar. Judg. p.* 335 § 71, also *Saw. Dig. p.* 6.
|| See *Mar. Judg. p.* 341 § 87, also *Saw. Dig. p.* 10.

Diga, succeeded in preference to brothers of the half blood.—*Thom. Inst. Vol.* 11 *p.* 645.*

If a deformed sister, for whom a suitable match cannot be got in *Diga*, get herself a suitable husband to live with her in *Binna*, the brothers must give up to her a due portion of her parents' estate according to the number of children; which portion she can dispose of as she thinks fit; but should she die childless and intestate, her share reverts to her brothers, and does not go to her husband.—*Thom. Inst. Vol.* 11 *p.* 648.†

The property derived from the father goes to the half brothers on the father's side, in preference to the half brothers on the mother's side; for example, A has a son by his first wife, and another son by his second wife, and dies, and his estate is divided, his widow marries again, bears children to her second husband, and dies; her son by A's children inherits in preference to his mother's children by her second husband.—*Thom. Inst. Vol.* 11 *p.* 644.‡

Nephews and Nieces.

10. Nephews and nieces of the whole blood, succeeded before the brothers of the half blood.—*Thom. Inst. Vol.* 11 *p.* 645.§

Nephews of the whole blood, being sons of the several brothers, share alike in the landed estate of an uncle dying childless, without respect to the numbers of each brother's family. Thus, if one brother leave one son, and another brother three sons, the lands of the third brother dying without issue would be divided into four shares, one to each of his four nephews. But if one of the first-mentioned brothers were still alive at the death of the childless brother, such surviving brother would take a moiety of the childless brother's estate, and the other moiety would be divided among the children of the other deceased brother. At the death, however, of such last surviving brother, if he should not have disposed of his moiety of his deceased childless brother's portion, by sale, gift, or bequest, a fresh division of the childless brother's estate will take place among his nephews or their respective heirs, as if his brother had not survived him; that is, the nephew's side; all share alike in the

* See *Mar. Judg. p.* 341 § 89, also *Saw. Dig. p.* 12.
† See *Mar. Judg. p.* 344 § 95, also *Saw. Dig. p.* 13.
‡ See *Mar. Judg. p.* 341 § 86, also *Saw. Dig. p.* 10.
§ See *Mar. Judg. p.* 341 § 88, also *Saw. Dig. p.* 11.

estate of their deceased childless uncle. Mr. Sawers adds, "It is held that the children of brothers are the nearest of kin to a man after his own children, and that the children of his sisters are of the same affinity to each other that the children of brothers are to each other; and that they cannot intermarry, being, in fact, called and considered brothers and sisters. But it is held that there is so little affinity of blood between the children of a brother and those of a sister, their custom makes their intermarriages the most approved connexion. The son of the eldest brother has a sort of vested right to have for his wife his cousin, the eldest daughter of his father's eldest sister; and the connexions of the most respectable families often run in this way from generation to generation."—*Thom. Inst Vol.* II *p* 645.*

Widows and Widowers.

11. When a man dies intestate, his widow and children are his immediate heirs; but the widow, though she had the chief control and management of the landed estate of her deceased husband, has only a life interest therein†, and at her death it is to be divided among the sons, excepting where there is a daughter or daughters married in *Binna*. These or rather their children, have the same right to a share of their father's lands as they.—*Thom. Inst. Vol.* II. *p.* 628.‡

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* See *Mar. Judg. p.* 342 § 91, also *Saw. Dig. p.* 11.

† See also 3262, *D. . (lombo*, 12 December, 1842; *Morg. D.* 345. The widow has also the chief superintendence and control of the estate for life. 7044, *G. A. Ratnapoora*; *Morg. D.* 2. Prescription does not run against an heir, pending a widow's rights. (2765, *D. C. Colombo*; *Morg. D.* 329.)

[But now it does, as against the *parveny* or ancestral property of the husband; but not against his *acquired* property; against which no prescription runs pending the widow's right to life interest.—See *Bev. & Mills Leg. Mis. p.* 33. (1866.) See also *Sup. Court. Cir. Vol.* vi. *p.* 85.—Ed.]

‡ The plaintiff, as only child of A by his first marriage, is entitled to inherit one half of his lands; and the children of his second marriage are entitled to inherit the other half thereof, subject to his widow's claim to maintenance from such latter half, even if A is to be considered sole proprietor, from prescriptive right, to his brother's share.—(4375, *D. C. Colombo*, No. 6, 25 *July*, 1844.) See *Mar. Judg. p.* 324 § 48.

The widow has no right to dispose of her husband's lands contrary to what the law directs, although she has the usufruct of them, unless she be thereto specially authorized by her husband, as a means of securing, at least, the dutiful obedience of his children; but if a widow, being barren, be the husband's paternal aunt's daughter, she inherits the acquired lands next to full brothers.—*Thom. Inst. Vol.* 11 *p.* 628.*

A widow of a husband dying childless has the same life interest, and that only, in the husband's landed property, whether hereditary or acquired, as the widow of a husband having issue; but if the widow be a second wife with issue, and there be issue by a former wife, the widow or widows must depend upon the shares of their children; and if the share of one of the widows should be insufficient for her and their support, the widow shall have a temporary allowance out of the share.—*Thom. Inst. Vol.* 11 *p.* 629.†

A widow loses her right and life interest in her husband's estate by taking a second husband contrary to the wish of her first husband's family, or by disgraceful conduct, such as glaring profligacy or adultery, or by squandering the property of her deceased husband. Any one of these acts being proved against her by the children would subject the widow to expulsion from the house of her late husband, and deprive her of any benefit from his estate.—*Thom Inst Vol.* 11 *p.* 629 ‡

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* A widow is entitled to the moveable property of her deceased husband; and her own children cannot call upon her for a division until her death; but the children of a former marriage of the husband, may claim their share. (*Sawer,* 14; *Marshall,* p. 345, par. 102: 14828, *D. C. Badulla,* 13 August, 1858.)—See *Mar. Judg. p.* 324, § 48.

† But if she has been left in a state of destitution, and has received land from a brother for her support, having a legal claim for assistance from him, her reoeceiving a second husband at his hands was a natural and sufficient consideration for the gift of the land to her, at least for her life. (6332, *Gov. Ag. Kornegalle, Morg. D.* 5.)—See *Mar. Judg. p.* 326 § 50.

‡ If a woman has become divorced from her husband, or is a widow destitute of the means of support, she would have a right to return to the house of her parents, and there to have lodging, support, and clothing from her parents' estate; but when she fails to pro-

When a man dies intestate, his widow and children are his immediate heirs;* the widow having the custody and administration of the property as long as she lives in her husband's house, conducting herself with prudence and circumspection, and doing nothing to cause shame or disgrace to the family, nor squandering the property. Provided the widow thus conducts herself with propriety, her children cannot call for a division of the property till her death, or till she quits her deceased husband's house; but the children of a former marriage of the husband may claim their shares. The widow is entitled to no more than a like share as one of the children.—*Thom. Inst. Vol.* 11 *p.* 650.

But she is besides entitled to what was considered her own wearing apparel, jewels and ornaments, commonly worn by herself and given to her by her husband; also to all the property she may have brought with her or her marriage, and what she may have acquired herself in the shape of presents, gifts or bequests, or what she may have purchased with the produce of her own hands, or gained by trade. Cattle are considered to belong to that description of moveable property of which she is entitled to an equal share with her children, out of her husband's estate.† A widow, whose husband has left no issue, is entitled, at her husband's death, to the whole of his moveable property, including money, grain, goods, slaves, and cattle, unless the three last mentioned have been heirlooms in her husband's family; that is, what he had inherited or received with the landed estate of his ancestors. But all goods or cattle acquired by the husband during the coverture, by purchase or by gift from others, the widow is entitled to a share of the produce of the slaves or cattle, being of the original stock of the husband's family. On leaving her husband's house, the widow has a right to carry with her all such property as she is entitled to as above stated. But if

duce evidence to this effect, she will have no such claim. (7901, *D. C. Kandy*, 14 *Sept.* 1836; *Morg. D.* 96.)—See *Mar. Judg. p.* 326 § 51.

* (NOTE BY MARSHALL, C. J.)—The following are Mr. Sawer's Memoranda of the Kandyan Laws which regulate the succession to *moveable* property.—*Mar. Judg. p.* 345 § 102, also *Saw. Dig. p.* 14.

† See *Mar. Judg. p.* 346 § 102, also *Saw. Dig. p.* 15.

her husband's family lands have been burthened with debt, or mortgaged by her husband's ancestors, the widow must give up as much of the moveable property as will amount to half the sum necessary for the disburthening or dismortgaging the landed property of the deceased husband: and if the deceased husband had himself so burthened or mortgaged his family estate, then his moveable property is liable, to the last article, to be disposed of for the liquidation of the same; in which case, the widow would get nothing, if the debt of the deceased exceeded the value of his moveable property to which she would otherwise be entitled.—*Thom. Inst. Vol.* II. *p.* 650.*

At the death of the widow, the moveable property is to be divided equally among the children, except the daughters who have already received their shares on being given out in marriage.—*Thom. Inst. Vol.* II. *p.* 652.†

In the event of there being no children, the widow inherits the whole of the household goods, grain in store, and the cattle which have been acquired, together with the increase in the husband's stock of estate subsequent to the marriage. The property, however, which the husband had inherited from his parents is generally claimed by his nearest kindred, and the widow has no share of it.—*Thom. Inst. Vol.* II *p.* 652.‡

A widow, having the administration of her deceased husband's estate, may, during the minority of her children, mortgage the landed property, if necessity require it. But this must be clearly to satisfy the necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt. But, in all cases where the children are as much as fourteen or fifteen years old, their consent is necessary to render such mortgage valid against them and their lands.—*Thom. Inst. Vol.* II. *p.* 667 §

A widow may appoint a guardian for her child or children, with the right to inherit such children's property, in the event of their dying in minority and without issue; but such guardian, appointed by the

* See *Mar. Judg. p.* 346 § 102, also *Saw. Dig. p.* 22.
† See *Mar. Judg. p.* 347 § 103, also *Saw. Dig. p.* 15.
‡ See *Mar. Judg. p.* 347 § 104, also *Saw. Dig. p.* 15.
§ See *Mar. Judg. p.* 359 § 146, also *Saw. Dig. p.* 33.

mother, will not inherit the property which the award inherits through his or her father, which will revert to the father's family.—*Thom. Inst. p.* 657.*

SECTION 5.

(From Solomons' Manuel.)

1. Inheritance to property regulated by the nature of parents' marriage.—2. Different kinds of marriage.—3. Marriage in Binna.—4. Marriage in Diga.—5. Requisites to marriage.—6. Corporeal capacity.—7. Prohibited Marriages. —8. Poligamy, Poliandry and Concubinage.—9. Illegal marriages.—10. Consequences of marriage.—11. Community of goods none.—12. Dissolution of marriage.—13. Separation and maintenance.—14. Separation *a mensâ*.—15. Death of wife.—16. Death of husband.—17. Kandyan marriage Ordinance.—18. Disposition of property.

Inheritance to property regulated by the nature of parents' marriage.

1. [In the Kandyan Districts] inheritance to property of any kind by children is regulated principally by the nature of their parents' marriage.—*Sol. Man. p.* 7.

Different kinds of marriage.

2. Marriages among the Kandyans are of two kinds, generally known as Binna marriages and Diga marriages.—*Ibid p.* 7.

Marriage in Binna.

3. A Binna marriage is a contract by which the husband after marriage resides in the house of his wife and is supported by her, or her relations.—*Ibid p.* 7.†

This occurs generally where the woman is an heiress and the man in less affluent circumstances, or where the family of the bride has few or no sons.—*Ibid. p.* 7.

In a Binna connection the wife is the head of the family, and she alone can regulate the management of the household. ‡ The whole property, moveable and immoveable is subject to her will, while the husband has no control over any portion of it during her life time. He is besides bound to obey her and is subject to all her whims and caprices. She may even order him out of the house at any time that he happens to incur either the displeasure of her parents, or what is more frequent the jealousy of herself. § By forming

* See *Mar. Judg. p.* 352 § 124, also *Saw. Dig. p.* 22.

† See *Saw. Dig. p.* 34, also *Perera's Armour p.* 5 § 2.

‡ See *Saw. Dig. p.* 37, also *Perera's Armour p.* 10 § 12.

§ See *Perera's Armour p.* 10 § 12, also *Saw, Dig p.* 37.

an alliance in Binna, a son does not lose his right to a share of his parents' property,—*Sol. Man. p.* 8.*

Marriage in Diga.

4. A Diga marriage is where the wife leaves her parents' place of abode and takes up her residence in the house of her husband. This is of the same nature or marriages amongst Europeans and is more common of the two in the Kandyan provinces. In a Diga marriage, the husband is sole manager of the estate. The wife has no voice in any matter, but is bound to let him have the fulldisposition of the property.—*Ibid. p* 7.

By marrying in Diga a woman loses her right of inheritance to the property of her parents; but she acquires instead, new rights from the patrimoney of her husband.—*Ibid. p.* 8. †

Requisites to marriage.

5. The sanction of the parents to the alliance was necessary to constitute a legal marriage; and where the parents were dead, the near relatives of the parties should have approved of the union.—*Ibid. p.* 8.

At one time no Kandyan marriage was considered valid unless it had been preceded by five feasts, which were given at different times, from the day when the bride was solicited till the seventh day after the celebration of the nuptials: such as, (1) the formal solicitation of the bride by the bridegroom, or exchange between the heads of the families on both sides of the messages established by custom, (2) that the horoscopes of the parties were examined and found to prognostigate a happy union, (3) that presents were made by the bridegroom to the bride, or by the family of the former to that of the latter, (4) that the wedding feast took place when the bride quitted her father's house to reside in her husband's or received her husband into her own residence, (5) that the ceremony of pouring water on the heads of the bride and bridegroom by some near relative took place on the seventh day of the nuptials.—*Ibid p* 9.‡

As these circumstances could be observed only by the wealthier portion of the community, they were after time not considered essential and fell into disuse. Marriages were thus considered good, if the parties to them were of the same caste, social respectability and rank; if the consent of the parents or guardians on both sides had been obtained; and if the relations of

* See *Perera's Armour p.* 56 § 9, also *Saw. Dig. p.* 6.
† See *Perera's Armour p.* 5 § 2, also *Saw. Dig. p.* 34.
‡ See *Perera's Armour p.* 5 § 3, also *Saw. Dig. p.* 34.

the parties to the third or fourth degree countenanced and sanctioned the union. When there was any doubt of the man and woman being of equal rank the matter was decided by proving inter marriages between the ancestors of each of the parties.—*Sol. Man. p.* 8.

But the want of this sanction on the part of the relatives of the bridegroom, or the omission of the wedding ceremony, or the fact of the bride's family holding a lower rank, would not invalidate the contract, if the parties happened to be of the same caste, and if the woman had been publicly acknowledged as the man's wedded wife. This applies to the case of a man whose parents are dead at the time of his marriage.—*Ibid. p.* 8.

The validity of a marriage solemnized before the passing of the first Kandyan Marriage Ordinance No. 13 of 1859 is proved by adducing evidence of the usual ceremonies having taken place.—*Ibid. p.* 9.*

Corporeal capacity.

6. Marriages could be entered into by young men above the age of sixteen, and, as it would appear, by females of any age, with the consent of their parents or guardians, though a young man is allowed in certain cases to marry without the consent of his relatives. Women could never contract marriages unless the parents, relatives, or guardians had sanctioned them. The fact of a woman having obtained her majority made not the slightest difference—the parents or guardian's consent was indispensable.—*Ibid. p.* 10. †

Prohibited marriages.

7. Among Kandyans some marriages were prohibited on account of consanguinity, affinity, or other causes.—*Ibid. p.* 10.

(*a*) Marriages between persons who were more closely related to each other than first cousins were absolutely void.—*Ibid. p.* 10.

(*b*) Marriages between the children of two brothers or of two sisters.—*Ibid. p.* 10.

A man who married a woman within the degrees of kindred prohibited by the law, or had any intercourse with her, were liable to be punished for incest. *Ibid. p.* 10.

But marriages between the children of a brother

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* See *Perera's Armour p.* 5 § 4, also *Saw. Dig. p.* 33. See also. No. 12 *P. C. Kegalla*, under the Marriage Ordinance, decided in appeal, 8th September, 1863.—*Examiner*, October 3, 1863.

† See *Perera's Armour p.* 2, also *Saw. Dig. p.* 28.

and the children of a sister were very common, and were by the natives considered the best matrimonial alliances that could be made.—*Sol. Man. p.* 10. *

8. Poligamy, Poliandry and Concubinage were allowed amongst the Kandyans with certain restrictions.—*Ibid. p.* 12. † **Poligamy, Poliandry and Concubinage.**

(*a*) A husband married in Diga could bring as many wives to his house as he thought proper without the consent of his first wife.

(*b*) The wife of a man married in Diga could not take a second husband to herself without the consent of the first spouse. The wife could not be compelled by her husband to receive a second associated husband, even where the latter was the brother of the first.

Besides which the consent of the wife's family to such a connexion was required, where the second associated husband did not happen to be a brother of the first.—*Ibid. p.* 12. ‡

(*c*) Concubinage was looked upon as almost of equal force as lawful marriage. If the woman was of the same caste as the man, and if the man himself or his family did not take some decisive step to break up or protest against the connection, it would be considered a lawful marriage, and the issue of it have all the privileges of legitimate children.—*Ibid. p.* 12. §

But casual intercourse by a married man with the wife of another would not be considered a marriage. And if in such a case the man were to die, the woman with whom he had intercourse would not be acknowledged, or have the rights of his widow.—*Ibid. p.* 12. ||

9. If it happened that a man formed an alliance against the wishes of his parents or guardians, or with a woman below him in caste, or was notoriously of bad repute, such a marriage was not considered lawful nor was its issue deemed legitimate. In such a case, the children could not claim anything which their father inherited from his ancestors. They would have a right only to the property which he had **Illegal marriages.**

* See *Perera's Armour p.* 8, also *Saw. Dig. p.* 37.

† See *Perera's Armour p.* 7 § 6, and *p.* 9 § 10, also *Saw. Dig p.* 37-38.

‡ See *Perera's Armour p.* 9 § 10, also *Saw. Dig. p.* 37.

§ See *Perera's Armour p.* 7 § 6, also *Saw. Dig. p.* 38.

|| See *Perera's Armour p.* 7 § 5.

himself acquired by purchase, or otherwise independently of his parents. And in the same way, a woman who married a man of a lower position forfeited all her rights to her praveni or ancestral property. But she was always entitled to claim maintenance from her parents, or, if they were dead, from the brothers, sisters, or, other relations who succeeded to the property which she would have inherited but for her marriage. It was the practice under the Kandyan Sovereigns, where a woman married a man of a lower caste, to sentence her to suffer capital punishment; but the sentence of death was in most cases mitigated to one of perpetual slavery.—*Sol. Man. p.* 9.*

Consequences of marriage.

10. There is a very great difference between the consequences of marriages contracted in Binna or Diga in the Kandyan territory, and the consequences of those contracted by Europeans and Burghers in the Maritime provinces. By the English and Roman Dutch Law, all the property belonging to the wife at the time of marriage becomes vested in the husband, and is placed at his absolute disposal, unless there exists an ante-nuptial contract to limit his powers. But in Kandy the husband has no control over the property brought by the wife on her marriage in the shape of dowry, or which she acquires during coverture by her own personal exertions, nor has the wife control over that of the husband. The husband or wife cannot sell or encumber any portion of the estate of the other party, or dispose of it by last Will without his or her special consent and sanction. Nor is the husband bound to pay any debt contracted by his wife before marriage, or on her own account during coverture; but he is liable for those debts which the wife had contracted after marriage under circumstances of necessity. The husband is not bound to answer claims preferred against his wife; he may decline to act as defendant on her behalf, or even to prosecute any claim which she may have against another party. But if the husband were absent from home and the wife and family reduced to great necessity, she is looked upon at law as agent and manager of her husband's affairs, and may mortgage the lands or sell their produce to procure subsistence for herself and her children. The wife can possess property in her own

* See *Perera's Armour p.* 8 § 7, also *Saw. Dig. p.* 38. See also *Austin p.* 235.

right, mortgage and encumber it at her pleasure; she may contract with third parties without her husband's knowledge or consent and sue them at law in her own name; she may contract with and sue her husband himself, and if successful may, according to Marshall, even issue writ of execution against his property. The wife's property is not liable to be seized in execution for debts contracted by the husband before or after marriage, unless the wife had given her sanction to her husband's contracting such debt, or had bound herself as surety for its payment, neither is the wife's property, inherited or acquired, liable to be confiscated on account of her husband's treason against the State.—*Sol. Man. p.* 10.*

Community of goods none.

11. In short, the general principle is that there is no community of property between husbands and wives in the Kandyan provinces. It must be mentioned, however, that property of any description, real or personal, which the husband had acquired by his own exertions during coverture, will be considered his own property and not his wife's, and the circumstance that the means of acquiring it was afforded by the wife, or her family, will not deprive him of his right to it.—*Ibid. p.* 11.†

Dissolution of marriage.

12. On the dissolution of a marriage, the wife cannot carry away anything from her husband's house, except the property which she brought with her in dowry. She will, however, be entitled to the property, moveable or immoveable, which she may have acquired during the coverture through her own exertions independently of her husband. In cases where the husband repudiates his wife without a sufficient cause, she is entitled to remove from his house all the wearing apparel which may have been presented to her by him. But if the wife left the husband against his wishes, she would have no right to any portion of her property, not even to her wearing apparel, however destitute she might be.—*Ibid. p.* 12.‡

Separation and maintenance.

13. A woman married in Diga, who is divorced by her husband without a sufficient cause, is entitled to maintenance from him; but if she voluntarily left him, or if the reasons which led to the dissolution of

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* See *Perera's Armour p.* 10 § 12, also *Saw. Dig. p.* 37.

† See *Perera's Armour p.* 9 § 11, also *Saw. Dig. p.* 34.

‡ See *Perera's Armour p.* 13 § 17, also *Saw. Dig. p.* 35.

the marriage were satisfactory, she will have no claim upon him. In the same way, if the parents removed her from his house without a just cause, or if she deserted him or left him against his wishes, the husband will not be obliged to provide for her maintenance. Should a wife be divorced from her husband, when in a state of pregnancy, and her family be in indigent circumstances, any gangsabe to which she may appeal will award her a suitable maintenance from her husband, until she gives birth to the child, and the child attains an age when he could be given over to the husband. But should she, after the child has attained a sufficient age to be taken under his care, refuse to give him up to the father—which she may do if she pleases—then the wife will have to support the child herself. A woman who has left her husband will not be entitled to maintenance from him if, after the divorce, she contracted a second marriage. If a woman abandoned her husband, carrying away with her any children that may have been born to him, then in the event of his death before her return to his house, she will not be entitled to claim for herself maintenance from the parents of her late husband, or any portion of the estate for her children as long as she retains them in her custody. But, if on the death of the husband, she gave up the children to her husband's parents, and if she did not afterwards contract a second marriage, then she will be entitled to maintenance from her father and mother-in-law.—*Sol. Man. p.* 15.*

If a woman married in Diga leaves her husband against his wishes, she is not entitled to demand the custody of her children; but her husband can, if he wishes, either allow her to remove a certain number with her, or, where she is unwilling, can compel her to take them. She cannot, however, be forced to take charge of more than half the number born to him. But if a man married in Diga repudiates his wife without a sufficient cause, she may either refuse to take any of the children, or can demand to have one or two of them under her management. The children who, in such a case of divorce, accompany their mother to her new residence, will not thereby lose their right of inheri-

* See *Perera's Armour p.* 14 § 19, 20, also *Saw. Dig. p.* 35-36.

tance to their father's estate. On the dissolution of a Binna marriage, the children will remain with the mother and shall have no claim for maintenance on their father. If a man and woman were first married in Diga, and afterwards removed to the woman's residence where the marriage was changed into a Binna connection—then, in the event of a divorce, the husband may either remove the children born to him while living in Diga, or he may allow them to remain with their mother; but in either case he must provide for their maintenance.—*Sol. Man. p.* 13.*

Separation *a mensa.*

14. A temporary separation between husband and wife will not be considered a divorce. If owing to domestic differences she quitted his house, intending to return after some time; or if she was obliged to leave his house when he was suffering from any contagious or infectious disease, and if the husband died before her return, she would be looked upon as his lawful widow and enjoy all the rights and privileges of one.—*Ibid. p.* 14 †

Death of wife.

15. The husband is not the heir to the landed property inherited by her from her parents, nor to any property acquired by her before marriage. But he inherits everything acquired by her during the coverture. On the death of the wife, the husband loses all interest in her ancestral estate, which if she has no issue reverts to her parents or their heirs. The wife is entitled to a life interest in her deceased husband's acquired property, but the husband ceases to have any claim on his wife's ancestral estate the moment she dies.—*Ibid p* 14. ‡

Death of husband.

16. A widow has a life interest in the landed property acquired by her husband during coverture, whether she has children or not. If there are two widows, both are entitled to life interests. A widow loses her right to her life interest by gross misconduct, profligacy and extravagance, or by contracting a second marriage against the wishes of her first husband's

* See *Perera's Armour p.* 14 § 18, and *p.* 15 § 21, also *Saw. Dig. p.* 35, 36.

† See *Perera's Armour p.* 15 § 23, also *Mar. Judg. p.* 343 § 93.

‡ See *Perera's Armour p.* 29 § 34, also *Saw. Dig. p.* 9. and *Mar. Judg. p.* 340 § 83. *Austin p.* 66. Test. Case No. 338, *D. C. Kandy.* Test. Case No. 13,736, *D. C. Kandy.* No. 47,197, *D. C. Kandy. Leg. Mis.* No. 662½, *D. C. Ratnapura.*

family. The widow has the control and management of the acquired landed property of the deceased during her life, but has no right to dispose of any portion of it by sale. At her death it must be divided equally among the sons and such daughters as are unmarried or married in Binna. If a widow dies without children, all the property which she received from her parents reverts to them, or to her brothers and sisters and their issue. The husband inherits the property acquired during the coverture; but the property acquired by her before marriage or during a former marriage, goes to the nearest of kin in her own family Failing brothers and sisters and their issues, the husband comes in before the wife's uncles or aunts and their issue.—*Sol. Man. p.* 15 *

Kandyan Marriage Ordinance.

17. Marriages under the Ordinance No. 3 of 1870 will be valid, if the man is sixteen years of age and the woman twelve, and if the consent of the parents or guardians has been obtained. The parties must give twenty-one days' previous notice, when the Registrar shall cause due publication of the marriage to be made by affixing copies of the notice at his office. If any opposition is made to the marriage, the Provincial or Assistant Provincial Registrar must summon the parties to the marriage, as well as those who oppose it, and after hearing them and their witnesses decide whether the objections are valid or not. If sufficient cause for staying the marriage is not shewn, the Registrar may at any time after the expiration of the twenty-one days register the marriage. Marriages may be dissolved on the following grounds (1) adultery by the wife after marriage (2) adultery by the husband coupled with incest or gross cruelty (3) complete and continued desertion for two years (4) inability to live happily together, of which actual separation from bed and board for a year shall be the test and (5) mutual consent. The Provincial Registrar or Assistant shall, if he is satisfied of the existence of good cause for the dissolution of a marriage, order that it be at an end, and it will then be held to be dissolved without prejudice to the children of such marriage born subsequent to its dissolution. Polgamy is declared

* See *Perera's Armour p.* 16 § 24, also *Saw. Dig. p.* 1, 14. *Mar. Judg. p.* 324 § 48. *Morg. Dig. p.* 2. *Austin p.* 210 § 186. *Crowther p.* 84. No. 7,044, *D. C. Ratnapura* No. 6,754, *D. C. Ratnapura.*

illegal and any person convicted of the offence is liable to be imprisoned with or without hard labour for any period not exceeding three years.

The term moveable property includes furniture, cattle, grain, staves, clothes and jewelry. If a man died intestate, his moveable property is inherited by his widow and children. The widow has the full administration of the property as long as she lives in her husband's house, and conducts herself with prudence and circumspection. Her children cannot call upon her for a division of the property; but the children of a former marriage can, when she will inherit the same share as a child. She is however entitled to the wearing apparel, jewels and ornaments given her by her husband, all property brought by herself on her marriage or acquired by her by purchase or gift during her coverture. If there are no children, the widow inherits all her husband's acquired property.—*Sol. Man. p.* 20. *

On the death of the widow, the moveable property is to be divided equally among the children—the only persons exempted being daughters married in Diga. The eldest son does not inherit more than any other of the children. If a man dies intestate leaving neither widow nor children, his moveable property goes to his parents: if no parents are living, to such of his brothers or sisters as may have rendered him assistance or support on his death bed. Failing brothers and sisters, nephews and nieces would succeed; failing them, uncles and aunts. One half of the acquired property goes to the heirs on the father's side; the other to the heirs on the mother's side. Property inherited by a man from his father will on failure of heirs revert to the father's family and the same with property received from the mother. On failure of the issue of sons or daughters married in Binna, a Diga married daughter would succeed. If she be dead, her father's brothers would succeed before her children. If the brothers be dead, her children would succeed in preference to her father's brother's children. If no heirs can be found to in-

* See *Saw. Dig. p.* 14.—*Mar. Judg. p.* 345 § 102.—*Perera's Armour p.* 16. § 24.

herit a man's property, it escheats to the Crown.—*Ibid. p.* 20. *

It is a rule of Kandyan law, that the debts of a deceased party must be paid by those who inherit his or her property according to the respective shares. In the case of sons, the payment of their father's debts, whether they inherited property from him or not, is enjoined as a sacred duty, but this obligation cannot be enforced in a court of law.—*Sol. Man. p.* 21. †

Section 6.

(*From Morgan's Digest.*)

1. Majority according to Kandyan Law.—2. Husband and wife.—3. Parents and children.—4. Brothers and sisters.—5. Nephews and nieces.—6. Widows and widowers.

Majority according to Kandyan Law.

1. Where a party died in the Kandyan district leaving a child, who was stated to be a minor, the Supreme Court directed administration to be granted to him, if he were of proper age, on which point the District Court was directed to require proof; and *per* CARR, J.—" If the applicant be a minor, the Court should, under rule 18 of sec. iv. appoint the party nominated by him, or some proper person selected at its discretion, to be a guardian to the applicant and grant a *limited* administration *durante minore ætate* to such guardian. The applicant would be entitled to obtain full administration of the said estate on attaining his proper age of manhood and discretion, which, according to Kandyan Law, would be at sixteen years of age, when he would be capable of marriage and competent to execute deeds, and answerable at law for debts and contracts entered into by him.—*Morg. Dig. p.* 105 § 423 (1836). ‡

2. Before the secondary proof can be admissible of the contents of a deed, the Court should have satisfactory proof upon oath of its having been surreptitiously taken by defendants (who plead that it never

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* See *Saw. Dig. pp.* 2, 3, 14—18.—*Mar. Judg. p.* 328 § 55 and *p.* 347 § 105.

† See *Saw. Dig. p.* 18.—*Mar. Judg. p.* 115.—*Nell C. R. p.* 157.—*Ratnapura D. C.* No. 869.

‡ No 1712 D. C. *Matale, (C.) Nov.* 26, 1836, (R. St. C.)—See Ord. No. 13 of 1859 § 2 and 3.

was made); or else of the loss thereof, and that due diligence had been made in searching for the same. The vague recollection of the District Judge or Secretary, not on oath, that an application was made about the loss of such a Deed by plaintiffs will not supply such omission. In default of such proof to support this alleged transfer by Deed, the custom of *Saffragam* as to the right of surviving husband to inherit the landed property of his deceased wife, by *Binna* marriage, should be ascertained, *Doloswella Dessawa*, and the other chiefs, appearing to have expressed opposite opinions thereon as stated in *Mr. Sawyer's Digest*. The adoption of the second plaintiff would also probably vary that right in the present case.—(No 1643, D. C. *Colombo* (*C*).—*Morg. Dig. p.* 258 §. 605 (1839).

Parents and Children.

3. This case was referred back to D. C. to take evidence on the following point laid down in *Sawyer's* Treatise:—"The father is not the heir of the property of his children born in a *Binna* marriage, which they have acquired through their mother. The maternal uncles or next of kin on the mother's side are the heirs to such children."—(No 5807, D. C. *Seven Korles*.—(Coll.)—*Morg. Dig. p* 295 § 643. (1840).

Though a woman married in *Binna* may have mistaken the grounds of her right (viz:) by inheritance), and rested her claim on a gift from her mother, there is no reason why that mistake should prevent her real claim from being enforced. No. 706. D. C. *Kandy*, (M.)—*Morg. Dig. p.* 16 § 79, (1834).

Marriage in *Diga* divests the wife of all right of inheritance to the property of her parents. No 6939. D. C. *Ratnapura*, (M.)—*Morg. Dig. p.* 13 § 63, (1834).

A marriage in *Diga* does not divest the wife of her inheritance where she has always kept up a close connection with her father's house; and this independently of the state of destitution in which she may be, and which of itself would entitle her to some assistance from the estate of her deceased parents.—No 690, D. C. *Madawalatenne*, (M.)—*Morg. Dig. p.* 15 § 73. (1834).

If a woman has become divorced from her husband, or is a widow destitute of the means of support, she would have a right to return to the house of her

parents, and there to have lodging, support, and clothing from her parents' estate; but when she fails to produce evidence to this effect, she will have no such claim.—No. 7901, D. C. *Kandy*, (C.)—*Morg. Dig. p.* 96 § 393. (1836.)

This case had been referred back to the Court below for the purposes mentioned in the decree of 26 July 1837, (see *ante* p. 183). Nothing new, however, having been elicited by the further proceedings, the Supreme Court proceeded to a decision between the original parties to the suit.

Jeremie, J.—The question raised is purely one of law. What interest does a Grandmother, when called to the inheritance, take in the estate of her Grandson, by established custom in *Saffragam*,—a permanent, or a life-interest? It has been matter of controversy, since the acquisition of the Kandyan territory, whether the mother took a life or permanent interest. Throughout the other provinces of that kingdom, there is no doubt that she only takes a life-interest; but in *Saffragam* the preponderance of authority and precedent, is clearly in favour of an exception; and the right of the mother to a permanent estate, seems now too well established to be disputed: indeed, on this point, the District Judge concurs with the Supreme Court.

A distinction has, however, been drawn in the decree appealed from, between the interest which the mother would avowedly have possessed, and that which belongs under similar circumstance to the Grandmother. This, however, appears to the Supreme Court on the fullest inquiry and investigation to be untenable. Even that portion of the testimony in this cause which affirms the mother's right to a life-interest only, makes no kind of difference between mother and grandmother, when the inheritance devolves on the latter.

And this seems the rule throughout the Kandyan Provinces, where, when the mother has a life-interest, so has the grandmother, when she alone survives; and when the one takes a permanent interest, so does the other: nor does there seem sufficent authority for disturbing this well-established analogy. The decree of the Court below is, therefore, reversed, and the lands claimed by the Plaintiff adjudged to him.—

No. 940. D. C. *Ratnapura.* (J.)—*Morg. Dig. p.* 201 § 542. (1837).

Brothers and Sisters.

4. The decree of the District Court of Colombo No 6 of the 22nd day of May, 1840 be affirmed with costs, the plaintiff being entitled as the only daughter of *Tikiri Mudianse* by his first marriage to half of his lands.

The Supreme Court considers the deed of both parties wholly undeserving of credit, the exhibit A filed by the plaintiff being of a very suspicious character and unsatisfactorily proved, and the exhibit B filed by the defendant having been already set aside in the former case 2779 on account of the signatures of the grantor and attesting witnesses not being written thereon, so that they have clearly been fraudulently added since; from the whole evidence, however, the parties are satisfactorily proved to be both daughters of *Tikiri Mudianse* by separate marriages, and his widow *Lokuhamy* having possessed a life interest in his estate, the defendant cannot maintain now any prescriptive title against the plaintiff's claim, (as recorded by the District Court on further proceedings) because the plaintiff acquired a right of possession only upon the widow's death which has happened within 10 years, and the proviso at the end of the clause 2nd of the Ordinance 8 of 1834 expressly declares, that the term of prescription shall only begin to run against parties having estates in remainder or reversion from the time they acquire a right of possession.* A question of law has been also raised by the Proctor for the appellant, whether the plaintiff has not lost her right to her father's property by her *Diga* marriage, (which is fully proved;) and the defendant being married in *Binna* is therefore entitled to succeed to the whole of his property; but it is laid down in *Mr. Sawyer's Digest* of the Saffragam customs page 89, that "the daughter being the only child of a man's first, second or third marriage, will have equal rights with her brother of the half blood in her father's Estate, even if given out in *Diga*," and as a sister of the half blood married in

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* But it has been since held, that prescription does run as against the *parveny* or ancestral property of one's father pending the mother's life-interest, though not against his *acquired property.*—See *Bev. & Mills Leg. Mis. p.* 33.—Ed.

Binna would clearly have no preferable claim to the brother of the half-blood, this Court considers that the plaintiff is entitled to an equal share with the defendant in their intestate father's land.—[No. 2765, *D. C. Colombo.*] (1842).—*Morg. Dig. p.* 328 § 710.*

Where a woman had married in *Diga*, and having subsequently been obliged to return to her *Diga* † village, had died there; *Held* that though on her return she was entitled to support and assistance from her half-brother, the defendant, (and this whether the father had enjoined it on him or not,) yet that, at her death, all claim upon the paternal property was at an end; and that her son, (who had settled in his father's village and inherited his lands,) could have no claim against the defendant.—No. 5137. Jud. Com. *Kandy*, (*M.*).—*Morg. Dig. p.* 3 § 13. (1833).

As regards succession by the Kandyan Law, the weight of authority founded both upon opinion and precedent is in favour of the rule—that the property of a person who dies leaving issue by two wives, should be divided amongst all his children equally: and this practice would seem to be more consonant with the principles of equitable distribution.—No. 6754, (1833) Gov. Ag. *Ratnapura.*—*Morg. Dig. p.* 2 § 8. ‡

Nephews and Nieces.

5. By the Kandyan Law, Nephews and Nieces of the whole blood succeed before Nephews and Nieces, as well as brothers even, of the half blood.—No. 971. *D. C. Seven Korles*, (C).—*Morg. Dig. p.* 101 § 408. §

Widows and Widowers.

6. By the Kandyan Law, a widow has a life-interest in the estate of her deceased husband; and is supposed to have the chief superintendence and control of the whole estate for life.—No. 7044, Gov. Ag. *Ratnapura.*—*Morg. Dig. p* 2. § 9, (1833.) ||

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* See *Perera's Armour p.* 37.—*Saw. Dig. p.* 3.—*Mar. Judg. p.* 331 § 59.—*Austin p.* 19.—*Kegalla C. R.* 1222.

† May mean to her own village.—Ed.

‡ Children of different beds inherit *per sterpes*, and not *per capita*. This, however, only applies to *paternal* inheritance—the maternal being governed by the old doctrine *per capita*.—See *Austin pp.* 25, 87, 105, 122.—Ed.

§ See *Perera's Armour p.* 44.—*Saw. Dig. p.* 11.—*Mar. Judg. p.* 341 § 88.

|| But now it is not.—See *Bev. & Mills Leg. Mis. p.* 33. (1886).—See also *Sup. Cir. Vol.* VI. *p.* 85.

Section 7.

(*From Austin's Appeal Reports.*)

1. Husband and wife.—2. Parents and children.—3. Brothers and sisters.—4. Nephews and nieces.—5. Widows and widowers.

1. *Matala D. C.* No. 19472.—The following is the decision of the Supreme Court:—"In a former case, the defendant's father sued the husband of the present plaintiff during coverture, for the lands which are the subject of the present action. In that suit, the plaintiff's husband, in his defence, set up a claim to the lands in his *own* right, and independent of his wife the present plaintiff. He, however, failed in his defence, and the lands were decreed to the plaintiff in that case. In the present action, plaintiff rests her claim entirely in her *own* right, and independent of her husband. The defendant has pleaded the judgment in the former case, with other grounds of defence. The Court below has found that plaintiff has established a title by prescription, but that the former judgment is binding against her, on the ground that as she might have been a party to that suit, the record is consequently evidence against her.* Now this is true as regards the lessor of a plaintiff in an action of ejectment, in which the defendant obtains judgment.† Such judgment may at any time be given in evidence against the lessor, for the possession of the lessee is his *own* possession, and his *own* title has been in issue. But not so in this case. By the Kandyan law there is no permanent community of goods between husband and wife, and their respective estates remain distinct from each other. The husband in the former suit claimed the lands as his own, independent of his wife, and the title of his wife was in no way put in issue. The Supreme Court, therefore, considers that the present plaintiff is not bound by the judgment against her husband, and that therefore she *can* maintain this action, and the Supreme Court agrees with the Court below that plaintiff has proved a prescriptive title. Judgment for plaintiff **Husband and wife.**

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* 1. Starkie, 260.

† 2. Bacon's Abrid. 616.

with costs." *Per Temple, December* 14, 1847.—*Austin's Rep. p.* 109.*

Kandy D. C. No. 15430.—*South Court.*—In this case the question was whether the husband or the full sister of deceased had a preferent right to a land, which the latter had acquired during coverture. The judgment of the Court below was as follows:—"The District Judge has been unable to find any judgment on the point which arises in this case, which is one of great importance, nor can he find any other authority that can be considered in point, than the one from Mr. Sawers' † cited by the defendant's Proctor, to the effect that the husband inherits all the property acquired by the wife during coverture. Until better advised, the District Judge must consider the authority above cited to be the Kandayan law on the point at issue. Plaintiff (the sister) is therefore non-suited." In appeal affirmed—" the decision bearing upon the point appear to be collected in *Mr. Armour's* work."—*Per Carr, Oct.* 10, 1884.—*Austin' Rep. p.* 66 ‡

Kandy D. C. No. 19306.—Plaintiff, as widow of one *Appo Vidane*, claimed certain lands for herself and on behalf of her three minor children. In appeal: " The point in issue in this case is, whether plaintiff was the *wife* or the *concubine* of the deceased *Appo Vidane*, and it should be open to the defendant to prove that she was of lower caste, which would raise a presumption against the alleged marriage, unless the plaintiff could show a due recognition of her as the deceased's *wife*, and it was also competent to the defendant to show by other evidence that she was his (the deceased's) *concubine*; and if she should be of lower caste, she would only be entitled to *acquired* property, and not to her husband's *parveny*; and in this event, it would be incumbent on the plaintiff to prove that the property sought by her to be recovered is such as she is entitled to."—*Per Temple, Nov.* 20, 1847.—*Austin's Rep. p.* 108.

Parents and children.

2. *Kegalla D. C.* No. 5414.—Held in appeal that where a man formed three separate marriages,

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* See *Perera's Armour, Sec.* 12. *p.* 10-11.—also *Saw. Dig. p.* 34 *and Sol. Man. p.* 11.

† See *Saw. Dig. p.* 16.

‡ See *Perera's Armour, Sec.* 33. *p.* 28.—*Saw. Dig. p.* 8.—*Mar. Judg. p.* 339. § 81.

leaving issue by each marriage, his property would have to be divided into three separate portions, the children of each marriage being entitled to one-third. *Per Carr, August 26, 1842.—Austin's Rep. p* 25.*

Kandy D. C. No. 17,509.—In this case the Supreme Court decreed that plaintiffs were entitled to one half of their father's lands, and the defendant to the other half. "The late father of the parties having left issue by two marriages, his estate should be divided into two equal portions, and defendant being the *only* child by one marriage is entitled to a moiety of her father's estate, and would not forfeit such right by her *diga* marriage in favour of her brothers or sisters of the half blood. There appears to have existed a difference between the Saffragam and Oodooratte customs on this point, as by the Saffragam customs a daughter of the half blood would never forfeit by any *diga* marriage, her right to inherit a share of her father's estate in favour of her brothers and sisters of the half blood; whereas the old Oodooratte customs made a distinction in such cases as to the rights of the daughter where she had been married in *diga* by her father, and where, she married in *diga* subsequent to his decease. Yet this distinction never extended to the mother's estate; and even in respect to the father's estate, it does not appear to have been adhered to or acknowledged by the Kandyan chiefs (who have been examined in the Supreme Court as Assessors and as witnesses to the custom),—the more liberal custom having generally prevailed, viz., that the daughters of the half blood do not forfeit by *any diga* marriage their right to inherit their parents' estate in favour of their brothers or sisters of the half blood."—*Collective, June* 24, 1843.—*Austin's Rep. p.* 87.

Matala D. C. No. 19,159.—"The Collective Court is of opinion that where a proprietor leaves issue by two marriages, his property must be divided into

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* See *Perera's Armour, Sec.* 12. *p.* 68. and *Sec.* 13. *p.* 74.—also *Saw. Dig. p.* 5. § 1.—*Mar. Judg. p.* 331 § 59.—*Sol. Man. p.* 19 § 2.—*and Lor. Rep. Vol. II. p.* 27.

[It is now a settled point in *Kandyan Law*, that the division is *per stirpes*, and not *per capita*, though *Armour* (Perera's Edition) on page 75, *Marshall* on pages 332—334, and an old judgment of the Supreme Court of 1853, reported in *Morg. Dig. p.* 2 § 8 are in favour of the latter. This, however, applies only to *paternal* and not *maternal* inheritance.—Ed.]

two equal portions, and the issue of each marriage is entitled to inherit a moiety. And furthermore that the plaintiff being the *only* child of the first marriage does not forfeit her right to a moiety of her parent's estate by her *diga* marriage, in favour of her brothers of the half-blood, who are entitled only to the other moiety." — *Collective, June* 24, 1843.—*Austin's Rep. p.* 105.

Kandy D. C. No. 20,898.—In this case plaintiff claimed a half of the lands of his deceased father *Kalooa.* It was admitted that plaintiff was *Kalooa's* issue by his first wife, and also that defendant was his second wife by whom he left four children, who were all minors. The Court below concurred in the opinion expressed by the Assessors, that the division of the estate should be *per capita,* which is in accordance with the old decisions mentioned by Sir Charles Marshall * In appeal reversed.—"The Judges consider that the decision of the Collective Court in the Matella case † ought to be followed, and that the point was fully considered and decided in it, and also in another case from the late District Court of Kandy North ‡ heard at the same General Sessions. The *Digest* of Sir Charles Marshall has been referred to as favouring rather the rule of division *per capita* than *per stirpes. That* portion of the *Digest,* however, was not published until after the above collective decision, and the Judges would entirely incline to such rule of division as being most consonant to natural justice, if they could view it as an open question, and would consider the result of the various conflicting decisions fully justified such opinion, which however they cannot *now* do. The rule that a *diga* daughter inherits *exclusively* when she is the only issue, and a *moiety* if she is sole child of the first marriage, although there may be several children by a second marriage, may be referred to as strongly in favour of the rule of division *per stirpes.* There seems, however, to have been a difference on the point between the *Oodooratte* and *Saffragam* customs, and much difference in practice has occurred, which renders some Legislative provision desirable." *Collective, June* 11, 1851.—*Austin's Rep. p.* 122.

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* See *Mar. Judg. p.* 332 § 68.

† See No. 19159 above.

‡ See No. 17509 above.

Kandy D. C. No. 23620.—*Sarana* was the original proprietor of a certain land. He had a sister called *Possamba*, and a daughter (who was married to plaintiff) *Rangkiri*. At *Sarana's* death, the daughter succeeded to the land; and on the death of the latter, her daughter *Belinda* (born to plaintiff) became entitled to the same. She, however, also died shortly after, and her father in this suit claims the land as sole heir-at-law. The defendants are the children of *Possamba* (*Rangkiri's* paternal aunt). The court below held that the father was the heir-at-law of his child. In appeal affirmed. *Per Oliphant. March* 18, 1852.—*Austin*'s *Rep. p.* 155.

Kandy D. C. No. 24094.—The following is the judgment of the Court below:—"It is admitted 1st. That the lands mentioned in the Libel had belonged to *Kiria Duraya*. 2ndly. That *Kiria Duraya* left three sons, of whom *Ookooa*, the plaintiff's late husband, was one. 3rdly. That *Ookooa* left a son *Kira* who died. Plaintiff therefore as heiress of her son *Kira* is entitled to one-third of the lands, and to participate in the produce thereof, though the 1st defendant as the widow of *Kiria Duraya* is entitled to have the control and management of the lands. The 1st defendant in her examination this day, has admitted that she resisted plaintiff's claim to any participation,—the Court is therefore of opinion that she should pay the costs of this suit." In appeal affirmed. *Per Carr. September* 16, 1851.—*Austin's Rep. p.* 163.

Kandy D. C. No. 706—In appeal decreed "that Plaintiff is entitled to, and that she be put in possession of one-half of the field of which her father died possessed. There seems now doubt from the evidence, that Plaintiff was really married in *binna*, for besides her own witnesses, one of the defendant's witnesses deposes to that effect, and though she appears to have mistaken the ground of her right and to have rested it on a gift from her mother (who she said had the disposal of her father's property after his death,) there is no reason why that mistake should prevent her real claim from being enforced." Defendant was entitled to the other half by right of Plaintiff's brother. *Per Marshall. May* 17, 1834.—*Austin's Rep. p.* 10. *

See *Morg. Dig. p.* 16 § 79.

Kandy D. C. No. 18457.—Plaintiffs (who were two sisters) claimed a certain land by right of their deceased mother. Defendant was their full sister. The Court below was of opinion that plaintiffs failed to prove that it belonged to their mother, but on the contrary held that it was the property of their father, "and although they did not claim under him, yet to prevent further litigation felt itself authorized to pass a judgment in respect to his heirs-at-law who are now before the Court. It is admitted that 1st. plaintiff is married in *diga*, and it has been proved that 2nd. plaintiff is married in *binna*. It appears also that the defendant, though at first married in *diga*, returned to her father's house and was subsequently married in *binna*. Adjudged therefore that the land in dispute be equally divided between the 2nd. plaintiff and defendant, and each party do bear their own costs." In appeal affirmed.—*Per Oliphant. December* 7, 1849. *Austin's Rep. p.* 96.

South Court. No. 14099.—Held in appeal that *diga* married daughters can inherit their father's property when there is no male issue. *Per Oliphant, February* 2, 1844. In this case the daughters were all minors when their father died, and were subsequently given out by their paternal uncle, to whose care they had been entrusted.

"The Supreme Court observes that the judgment does not comply with the terms of the 34th Rule, section 1, *Civil Jurisdiction*, inasmuch as it does not state the grounds of the decision. This omission however is no reason for reversing the judgment."—*Collective. December* 16, 1844.—*Austin's Rep. p.* 59.

Kandy D. C. No. 22692.—The following is the judgment of the Court below:—"In this case it is admitted that the former proprietor of the lands (*Nayda*), left three daughters, of whom the eldest died leaving a son, who is in possession of one-third of the lands; and that the defendant who is another of the daughters, is in possession of the remaining two-thirds: whereas the plaintiffs who are the issue of the third daughter, are not in possession of any portion of the Estate. It is clear that the plaintiffs are entitled to one-third of *Nayda's* Estate, unless the defendant can prove to the contrary. The court is therefore of opinion that the burden of proof lies upon the defendant, but her Counsel calling no

witnessess, judgment is entered for plaintiffs." In appeal *set aside.* "The Supreme Court considers that the *onus* of proof is with the plaintiffs, they having to prove that they are the children of *Okkoo* (one of the daughters,) which is denied." *Per Temple. December* 13, 1850.

On the next trial day, plaintiffs proved satisfactorily that their mother was *Okkoo.* The defendant then led evidence to contradict the fact, as well as to prove that *Okkoo* was married in *diga,* alleging that herself and her other sister were married in *binna.* "The evidence as to the marriage of *Okkoo,* the plaintiffs' mother, is vague, but in the absence of positive proof of a *diga* marriage, the Court will presume in favour of the *binna* one. But there is evidence that *Okkoo* always resided in one of her *father's gardens.* As to the defendant having possessed two-thirds of the Estate since the death of plaintiffs' mother, that is accounted for by the circumstance of the plaintiffs being very young at the time of their mother's death, and the defendant as their aunt and only female relative having naturally taken charge of them. Judgment for plaintiffs." In appeal affirmed. *Per Carr. September* 19, 1851.—*Austin's Rep. p.* 141.

Kandy, D. C. No. 5137.—Where a woman returns in a destitute condition from her *diga* village, she is entitled to support from her parent's estate, but at her death all claim upon the paternal property is at an end, and her son is not entitled to any share of it. *Per Marshall. November* 1, 1833.—*Austin's Rep. p.* 22.*

North Court.—No. 12,247. Defendant rests her claim to the garden in dispute, solely upon her prescriptive right. It appears she was the paternal aunt of the plaintiffs, and is admitted to have been married in *diga* subsequent to which she returned in a destitute condition, and took up her abode in the garden in question. The Court below held that by the Kandyan law she was undoubtedly entitled to lodging, support, and clothing from her parent's estate, but nothing more; and merely because she was allowed to remain on the property for a length of time, she cannot now set up a title to the same.

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* See *Morg. Dig. p.* 3 § 13.

Judgment for plaintiffs. In appeal altered to "defendant to hold the land for life in lieu of maintenance, and each party to pay their own costs." *Per Oliphant. September* 1, 1840.—*Austin's Rep. p.* 49.

South Court.—No. 14991. A man died leaving a widow, a son, and two unmarried daughters. Subsequently the daughters were given out in *diga,* and their mother and brother continued in the exclusive possession of the lands belonging to the deceased's estate. One of the daughters now brings this action against the mother and brother for *her* share, and the other daughter comes in as Intervenient for a like share. The Court was of opinion that although a daughter forfeits her right to inherit her father's estate by being given out in *diga* before his death, yet, being unmarried at the time of the father's death, and having acquired a right, she does not forfeit that right by a subsequent marriage. Judgment accordingly that the three children be equally entitled to their father's lands, reserving nevertheless to the widow a life-interest therein. In appeal reversed, "and 2nd. Defendant is decreed to be the sole heir of his father's estate, subject to his mother's life-interest therein, as the daughters *have* forfeited their right to inherit their father's estate by having been married out in *diga* by their mother". *Per Carr. October* 11, 1844.—*Austin's Rep. p.* 64.

Kegalla D. C. No. 4054.—In this case plaintiff was the only daughter by a man's *first* wife, and was given out in *diga* by her father. Defendant was the son by the *second* wife. Plaintiff now claims one-half of the lands of their deceased common father. Defendant pleads 1st. that she has forfeited her right by having been given out in *diga,* and 2nd. that whatever their father intended to give her, had already been given as a dowry upon her marriage. The Court below held, that inasmuch of the Kandyan law, according to Sawers, was that "a daughter being the only child of a man's first, second, or third marriage will have equal rights with her brothers of the half-blood in their father's estate, *even if given out in diga,*"* therefore that plaintiff was entitled to the share now claimed, and judgment was accordingly entered. In appeal,—" the question in the present case is whether

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* See *Saw. Dig. p.* 3 § 4.—*Mar. Judg. p.* 331 § 59.

a daughter of the half-blood married in *Diga* is entitled to succeed jointly with her half-brother to the estate of their common father, and the Assessors and other chiefs examined as to the custom are of opinion that she does not succeed if she was endowed by her father on the occasion of her *Diga* marriage, but that if she was not so endowed, *she does*. Proceedings therefore referred back for evidence of the fact set forth in the Petition of Appeal, that on the occasion of the respondent's marriage she received the requisite dowry." *Per Jeremie. March* 20, 1838.

Evidence was then heard, and no dowry being proved, the judgment of the Court below was affirmed. "The Supreme Court has already decided in a similar case in appeal,* after referring to the old decisions on the point and with concurrence of the majority of the several Chiefs in attendance, (three being examined as Assessors, and six as witnesses to the custom,) that where a proprietor dies leaving a daughter by his first wife and a son by his second wife, the daughter is entitled to a half of her parent's estate, and the brother to the other half; and such daughter will not lose this portion by any *Diga* marriage, in favour of her half-brother by the second wife;—but if there had been also a son, or another daughter married in *Binna* by the 1st wife, such son or daughter of the whole blood would inherit the one half in exclusion of the sister married in *Diga*, excepting to her claim for maintenance in case she returned destitute."—*Per Carr. August* 24, 1842.—*Austin's Rep. p.* 19.

Kandy D. C. No. 16679.—Plaintiff's claim rests in right of his mother who was originally married in *Diga*, but who having afterwards returned in a destitute condition to her parent's house, was allowed the possession of a few cocoanut trees for her support, which trees the plaintiff now claims. The court was of opinion that as the mother of plaintiff was married in *Diga*, she could have a life-interest only that the cocoanut trees she got for her support, and therefore dismissed plaintiff's case. In appeal ordered that the case be referred back to take evidence as to the manner in which the trees were given: whether as an absolute gift, or only as maintenance.—*Per Oliphant. August* 31, 1840.—*Austin's Rep. p.* 82.

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* See Case No. 3403. *D. C. Matala.*

Kandy D. C. No. 816.—Held in appeal (after hearing the evidence of three chiefs on the point,) that where a woman possessing property dies leaving a husband and two daughters, the daughters inherit their mother's lands : and should one of the daughters then die without issue, the sister is entitled to her share in preference to the father.—*Per Rough. August* 18, 1834.—*Austin's Rep. p.* 11.

Kandy D. C. No. 23067.—In this case the Plaintiffs as the sisters of *Hendrick Perera* deceased, seek to recover certain lands which belonged to him by purchase, alleging themselves to be his only heirs. The defendant denies their right, and alleging that the said *Perera* was her husband and that he left a son by her, claims the properties in question for herself as his widow, and her said son as sole heir-at-law to him respectively. The Court below found that the defendant had not been married to *Perera*, but that nevertheless, his child though illegitimate, was entitled to the lands in question as the *acquired* property of the father, and gave judgment accordingly. In appeal *set aside*, the Supreme Court being of opinion that the Court below was wrong in departing from the pleadings, the Answer having set up a marriage which had not been proved; and thereupon the case was remanded to allow defendant an opportunity to amend her Answer if so advised. *December* 31, 1851

At the second trial upon such amended pleadings, the Court below delivered the following judgment. "*First* as regards paternity, the Court is satisfied that the infant is the child of the deceased; and *Secondly*, that although defendant was not married to him, yet by Kandyan law the issue of a connection such as subsisted between *Perera* and defendant, would be entitled to inherit all his *acquired* property; and the authorities on the point are borne out by a judgment given in a similar case in the late Judicial Commissioner's Court of Kandy, when Mr. Sawers and the Chiefs held that the children of such a connection, though the mother was of *inferior* caste to the father, were entitled to inherit his *purchased* property.* Here however there is sufficient proof that defendant was of *equal* caste with *Perera*. Though her father was a Malabar

* Date of decision, *December* 13, 1824.

man yet his position in the King's household made it necessary that his rank should be equal to that of *Vellalla*; *Thirdly*, the Court is of opinion that this is a case in which *Kandyan* law must operate. The 8th clause of the Ordinance No. 5 of 1852 for restricting the operation of Kandyan law, only refers to persons commonly known as Europeans and to their descendants, and persons commonly known as Burghers, and cannot be made to apply to either defendant or *Perera*,—the former a Kandyan born woman, the latter a pure Cingalese. Judgment therefore for defendant on behalf of her minor child." In appeal affirmed. *Collective. September 22, 1856.—Austin's Rep. p.* 147.

Brothers and Sisters.

3. *Kandy D. C.* No. 26838.—Plaintiff (a *Diga* married woman) claimed certain lands in right of her deceased brother *Appu*, who inherited them from his father *Keeralle*. 1st. defendant (the mother of plaintiff and *Appoo*) left *Keeralle* after the birth of these two children, and contracted a second marriage; and at the time of this action she was living in the second husband's house. The 2nd. defendant who was also her son, claimed the lands jointly with plaintiff, alleging that he was also the issue of *Keeralle*. This the plaintiff denied, but admitted that 1st. defendant was his mother, he being the issue of her second husband. The Court below was of opinion that the burden of proof was on the 2nd defendant, " for unless he proves that he is a son of *Keeralle*, plaintiff would be entitled to judgment; for either as the surviving daughter of *Keeralle*, or the surviving full sister of *Appoo* (who had become the proprietor in consequence of plaintiff's *Diga* marriage), her title is good as against either the mother or half-brother." Defendant's counsel declining to call evidence, judgment was entered for plaintiff. In appeal affirmed. *Collective. January* 21, 1857.—*Austin's Rep. p.* 190.

Kandy D. C. No. 27254.—*Punchy Ettena* was the original proprietress of the land in dispute. She left children of whom plaintiff was a *Diga* married daughter, and defendant was a son. The latter contended that his sister had forfeited her right by her *Diga* marriage, and further pleaded prescription. The Court below was of opinion that the *Diga* married daughter did not forfeit her right to her *maternal*

inheritance,* and consequently since she was an heir had a *prima facie* title to a share, the defendant was called upon to lead evidence to prove his alleged prescriptive possesion, the burden of proof being on him. Defendant appealed and in his petition stated that according to the Kandyan law as laid down in *Armour*, a *Diga* married daughter *would* forfeit her right to her mother's property in favour of her brother, if the mother had derived such property from her (the mother's) *father.* † The Supreme Court *set aside* the judgment of the District Court and remanded the case for a new trial,—"being of opinion that there is no admission or evidence on the face of the proceedings, to show that the land in question was not inherited by *Poonchy Ettena* from her father, and that being so, and it being admitted that plaintiff was married out in *Diga*, she has no such *prima facie* title to the property as justified the District Court in calling on the defendant to lead evidence." *Collective. November* 28, 1856.—*Austin's Rep. p.* 194.

Kandy D. C. No. 27911.—The following is the Judgment of the Court below. "In this case the point for consideration is, whether plaintiff by her admitted *Diga* marriage, has not forfeited her right to the lands in question,—those lands being admitted to have been the property of her *mother's father.* On this point it is clearly laid down by Armour ‡ that if the mother left a daughter married out in *Diga* (as plaintiff admits to be), and a son (defendant), the *latter* would inherit the lands derived from his mother's paternal ancestors to the exclusion of his *Diga* married sister. This authority the Court considers conclusive, and plaintiff by her *Diga* marriage must be considered to have forfeited all right to the lands in question,—it not having been shown that the parents of the parties had each an independent estate. Plaintiff's claim is dismissed." In appeal affirmed. *Collective. December* 5, 1856.—*Austin's Rep. p.* 199.

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* See *Perera's Armour p.* 82.—also *Mar. Judg. p.* 332 § 67, and p. 336. § 74.—and No. 13943 *D. C. Badulla*, reported in the Ceylon "*Legal Miscellany*" *Part I. p.* 51.

† See *Perera's Armour p.* 80 § 4.

‡ See *Perera's Armour* p. 8\

Kandy D. C. No. 7901.—In this case judgment was entered for plaintiff, and in appeal affirmed. "If the defendant (plaintiff's sister) has become divorced, or is a widow destitute of the means of support, she would have a right to return to the house of her parents, and *there* to have lodging, support, and clothing from her parent's estate; but the evidence in this case will support no such claim by defendant."* *Per Carr. September* 14, 1836—*Austin's Rep p.* 34.

Kandy D. C. No. 28877. †—In this case Plaintiff was non-suited with costs, the Court being of opinion that a brother cannot maintain an action against another for a division of their father's estate during the life-time of their mother, as by Kandyan law at the death of the husband, his estate vests in the widow. In appeal *set aside* and case remanded for a new trial. "The general question raised at the trial does not arise on the pleadings, according to which the heirs would seem to have entered into and possessed their shares respectively with the concurrence of the widow,—the only question being whether the lands were held in *divided* or *undivided* shares? The Court must determine the issues raised by the parties." *Collective. January* 10, 1860.—*Austin's Rep. p.* 209.

4. *Kandy D. C* No. 23,975.—Plaintiff claimed a certain land of his deceased father *Manikralle*. Defendant admitted that *Manikralle* was the proprietor, but denied that Plaintiff was his son. He however admitted that Plaintiff was the son of *Keeralle*, the youngest brother of *Manikralle*, and stated further that *Manikralle* was an associated husband with himself, and had left issue one *Punchyralla* who upon petition was allowed to intervene. On the trial-day the Court below held that the *onus* of proof was on the Intervenient, because he having admitted that plaintiff was the nephew of *Manikralle*, the plaintiff would be entitled as his heir-at-law unless intervenient can prove that he (the Intervenient) was *Manikralle's* son. Intervenient's Counsel however declined to call witnesses, whereupon judgment was entered for plaintiff. In appeal *reversed* and case remanded for re- **Nephews and Neices.**

* See *Morg. Dig. p.* 96. § 393.

† This No. is rather doubtful. Try No. 28887.—Ed.

hearing and for judgment *de novo*. "The *onus* is clearly upon plaintiff to begin, as in his Libel he claims the lands in dispute as the son of *Manickralle*, and not as the son of his younger brother *Keeralle* on which the parties have never taken issue. If the plaintiff has any claim as being heir as such nephew of *Manickralle*, he must institute a fresh action." *Per Carr, September* 13, 1857.—*Austin's Rep*. p. 160.

Kandy D. C. No. 27,132.—Plaintiff was the admitted nephew of *Wattooa* deceased who was the proprietor of the lands in dispute, but having claimed in his Libel as *son* of *Wattooa* which was denied by defendant (who was Wattooa's *deega* married sister,) and having called no witnesses in support of the statement in his Libel, he was non-suited. "If plaintiff has any claim as *nephew*, he must institute a fresh action."* In appeal set *aside* on payment of costs of day and of appeal, "and plaintiff be at liberty to amend his Libel if so advised on payment of costs consequent upon amendment".—*Collective, October* 15, 1856.—*Austin's Rep p.* 192.

Widows and Widowers.

5. *South Court* No. 13,679.—In this case plaintiff sued his deceased brother's wife for a certain land which he alleged was hereditary property, belonging to himself and his late brother. The defendant admitted that it was hereditary property, but denied that plaintiff ever possessed any portion of it. The Court below without entering into evidence was of opinion, that "inasmuch as plaintiff and defendant's late husband were brothers, and the land in question having descended from their father, plaintiff should be entitled to one half and defendant to the other half, she having a right to her life interest in her husband's property." In appeal proceedings referred back for evidence as to the exclusive possession of defendant's late husband. "If satisfactory evidence can be adduced on this point, plaintiff can in no way have a right to a moiety,—but in failure of such proof, plaintiff and defendants will each be entitled to a half." *Per Carr, September* 3, 1841.

The Court below then entered into evidence and was of opinion that defendant's late husband possessed the field exclusively for more than ten years, although plaintiff had originally a right to a moiety.

* See No. 23,975, *page* 189 *ante*.

Plaintiff's claim was therefore dismissed and in appeal affirmed. *Per Oliphant, February* 6th, 1844.—*Austin's Rep. p.* 53.

Kandy D. C. No. 17,697.—In this case which was instituted in 1842, the 1st defendant who was widow of one *Ookooa,* sold certain lands to plaintiff, she having previously received them from the late husband upon a Notarial deed. The second defendant, who was the brother of *Ookooa,* alleged that these lands devolved upon his brother and himself by right of their father who died in 1821, and that therefore *Ookooa* became entitled to a half only, and he (2nd defendant) to the other half. That nevertheless *Ookooa* cultivated the whole of the lands, and gave the produce to their mother till her death which took place about eight or nine years ago, and that he (2nd defendant) did not cultivate nor take any produce from his own half since 1821. The Court below was of opinion that *Ookooa* had gained a prescriptive title by 2nd defendant's own statement, and therefore gave judgment for plaintiff. In appeal *set aside,* and case remanded back for evidence. "According to the statement of the second defendant, the lands in dispute belonged to his father, and his widow (2nd defendant's mother) would therefore be entitled to a life-interest therein. The delivering of the produce to her by *Ookooa* was not adverse to the 2nd defendant's claim to inherit a moiety, because under the Proviso at the 2nd clause of the Ordinance No. 8 of 1834, prescription of ten years begins to run only from the time when the party claiming acquired a right of possession, which the 2nd defendant did upon his mother's death. Neither does it appear that the 2nd defendant admits the validity of the 1st defendant's Deed of Gift from her late husband, and unless it be proved, he would be entitled to his brother's moiety as his Heir, subject to the 1st defendant's life-interest as widow." *Per Carr, September* 5, 1845.—*Austin's Rep. p.* 88.

Kandy D. C. No. 17,748.—Plaintiff, as next of kin to deceased, seeks to recover from defendant who is the admitted childless widow, possession of certain lands which belonged to the said deceased, alleging as a ground for doing so, that the widow was alienating her husband's property. The Court below was of opinion that this action was both premature and

wrongly brought. "Since the widow is entitled to the possession of the property, she cannot be subject to an action of ejectment by any person claiming as heir-at-law. If it be true that the widow is alienating the property, some course may be resorted to by those having an interest, to restrain her. Plaintiff non-suited." In appeal affirmed. *Per Stark, September* 21, 1846.—*Austin's Rep. p.* 88.

Kandy D. C. 26,329.—Plaintiff says that she as the issue of the *first*, and 2nd defendant as the issue of the *second* bed of *Kankanama* deceased, are each entitled to an undivided moiety of their father's lands; but defendants being in the possession of the whole, this action was brought to recover her share. Defendants admit all this, but state that neither Plaintiff nor 2nd Defendant is entitled to the possession of the lands during the life of the 1st. Defendant who is the widow of the deceased, and mother of the 2nd Defendant; and who as such widow is entitled to the possession of the *whole* during life, the same being of small extent and barely sufficient for her support, the Plaintiff moreover being otherwise well provided for. Plaintiff demurred to this answer on the ground that 1st. defendant had no right to a life-interest *in the whole*, and that the alleged smallness of the estate was no reason why Plaintiff's claim should be dismissed. On the day of argument, after hearing Counsel on both sides, the Court was of opinion that a child by the first bed was entitled to the possession of the share immediately upon the death of his father.* "The authority in *Armour* alluded to by defendant's Counsel, contemplated that of a son or grandson of the *same widow*, who shall in such case be entitled to the exclusive possession during her life †; and according to the other authority quoted ‡, if the estate be of *small extent*, then although the widow *had not a child* to the deceased, she will be entitled to retain possession to the temporary exclusion of the deceased's heir-at-law (his brother for instance), whose title to succession shall remain in abeyance until the widow's demise, or until she shall have contracted another marriage. It does not appear however that this section contemplates the right of a

* See *Mar. Judg. p.* 326 § 50.
† *Perera's Armour p.* 24 § 1.
‡ *Perera's Armour p.* 20 § 2.

child of the deceased, but only members of his family of *a more remote* degree.

Demurrer upheld, and judgment for Plaintiff for an undivided moiety as prayed for." In appeal affirmed. *Collective, June* 29, 1854.—*Austin's Rep. p.* 184.*

Kandy D. C. No. 28,221—The following is the judgment of the Court below: "Plaintiff seeks to recover from defendant certain moveable and immoveable property belonging to the estate of her deceased father *Molligodde Dissawe*, undertaking to maintain defendant who is the childless widow of her deceased brother. Defendant demurs to this Libel on two grounds. 1st, that according to plaintiff's admission in the Libel defendant is entitled to a life-interest in one half of the estate of the *Dissawe*; and 2ndly, that plaintiff has not set out specifically the articles of jewellery, &c. which she claims. It is admitted that plaintiff and defendant's late husband *Lakum* were the children of *Dissawe* by different beds, and heirs to his estate,—the only question therefore for the Court's consideration is, whether under such circumstances, defendant as the widow of *Lakum* is entitled to a life-interest in the undivided half portion of the estate of the *Dissawe* which devolved to *Lakum* at the demise of his father; and this question has been raised by way of demurrer,—for if by Kandyan law or custom defendant be so entitled, this action in its present form cannot be maintained. *Armour* in his "Notes" on Kandyan Law would seem to imply that a widow under such circumstances would only be entitled to a *maintenance* from her late husband's estate, the residue of the property going to the heir-at-law † but Sawers (an authority of well deserved and acknowledged repute) lays down as the Kandyan Law the distinct reverse, his words (strictly applicable to the present case) being *if a man die leaving a wife without children, and brothers and sisters, his landed property belongs to his widow during life*, ‡ and this doctrine has uniformly been up-held in this Court. The Court therefore considers that defendant, as the widow of the late *Lakum*, is, according to

* On the question of widow's right to Life-interest now, see *foot-note* to *page* 158, *ante*.—Ed.

† See *Perera's Armour p.* 22 § 26.

‡ See *Saw. Dig. p.* 1.

Kandyan law, entitled to a life-interest in the landed estate by which he died possessed. Demurrer therefore held good, and plaintiff non-suited with costs." Plaintiff appealed, but upon motion of her Counsel in the Supreme Court, the appeal was withdrawn on payment of costs. *Collective, October 29, 1856.—Austin's Rep. p. 202.*

Kandy D. C. No. 9,564.—In this case the Court below allowed the widow in preference to the nephew to take out Letters of Administration of the Estate of the deceased. In the course of the proceedings, mention was made of an adopted son of the deceased (a minor), but nothing transpired in the judgment with regard to him. The nephew appealed, and in appeal "affirmed as to the grant of administration to the widow, except that the said grant shall be expressly limited to whilst she remains unmarried; and a power shall be reserved therein for the son alleged to have been adopted by the deceased, being hereafter joined in such administration with the widow upon his attaining his majority, and satisfactorily proving to the Court that he was really the adopted son of the deceased. Upon investigation, this Court does not consider there are any proofs of fraud in the omission to file the inventory of moveables, or in the production of the Will by the widow, to warrant its refusing to her administration, it appearing that the above omission in the inventory was owing to her ignorance, and her having a customary title to the moveables; and that the Court disallowed the Will, as the deceased was at that time a convict for treason, and therefore unable to make any Will. In regard to the genial right of the widow to administration, this Court has upon previous instances granted joint administration to the widow and adopted son; and it entertains no difficulty in saying that the widow is entitled to preference therein, both as regards general principles and established practice, as well as under the Kandyan law which gives the widow control over the Estate whilst she remains unmarried. Consistently with this customary law however, this Court considers that all such grants to widows should be expressly limited to during the time that the widow remains unmarried."—*Per Jeremie, September 3, 1838,—Austin's Rep. p. 233.*

SECTION 8.

(*From Beven & Siebel's Appeal Reports.*)

1. Husband and wife.—2. Parents and children.—3. Widows and Widowers.

1. *Kandy D. C.* No. 338.—In this case, the paternal aunt, the husband who also pleaded a deed, the half-brother, and the sister of the intestate applied for administration to her estate. On the day of trial the 3rd and 4th applicants were absent, and it was admitted that the 1st applicant was the paternal aunt, and the 2nd applicant the *Binna* husband of the deceased. The District Judge granted administration to the 1st applicant, the paternal aunt of the deceased. He states, "It seems unquestionable that a *Binna* married husband has no right or interest in his wife's estate from the moment of her death." An appeal was taken by the 2nd applicant, on the grounds that the Rules and Orders contemplate the widower or widow's preferent right to administer to that of the next of kin, and that such is the rule in all districts irrespective of the right of property; and further that a *Binna* husband has a life interest in all property acquired during coverture. The following is the judgment of the Supreme Court: The Supreme Court concurs with the District Court in finding that a *Binna* husband has no right to or interest in his wife's estate after her death. Such has always been the received construction of the Kandyan Law on this subject, and the Supreme Court has failed to discover any good reason or authority to induce it to doubt the correctness of such construction. The case in the Judicial Commissioners Court (*Diary, August 1829,* No. 3033) referred to by the learned Counsel for the appellant, would seem to depend more upon the construction given to the deed referred to in the Judgment than to a deliberate consideration of the abstract law on the subject. It has been urged in support of the appeal that the *Binna* husband has at least an interest in the property acquired during coverture. The plea was only taken, however, in the petition of appeal, the only question submitted to the District Court at the hearing having been that relating to the interest of a *Binna* husband in his wife's

Husband and wife.

estate. This plea involves an issue of fact, and the Supreme Court cannot allow the appellant to take it for the first time in appeal. In his original application, the appellant relied upon a deed by which his wife was said to have conveyed all her property to him. This deed, if established, would have given the appellant an all-sufficient interest in his wife's estate and an undoubted right to represent the same. Its genuineness was, however, denied by the respondent, and yet at the trial the appellant called no evidence to prove that deed. Under these circumstances, and considering the necessity of a speedy decision in these administration suits, and that an affirmance of this order will not deprive the appellant of an opportunity to establish, if able to do so, his interest in his wife's estate, either under the deed, or in respect of the property acquired after coverture, the Supreme Court considers the order of the District Court should be, and the same is hereby *affirmed*. (26 *January*, 1860.)*.—*Bev. and Sieb. Rep. p.* 51.

Parents and children.

2. *Kandy D. C.* No. 59273.—Plaintiff claimed one-fourth of her father's lands from defendants, her three sisters. Latter admitting Plaintiff's relationship, stated that on the death of their associated fathers, second and third defendants succeeded to the possession of the lands, their sisters, Plaintiff and first defendant having been married out in *Diga* and having thereby forfeited their rights.

It transpired in evidence that Plaintiff when young was married out in *Diga* to Hatereliadde Banda to whom she had a child; that she was recalled by her parents and returned home bringing her child with her; that she was married by her parents to Toradenia Banda (whether in *Binna* or *Diga* was doubtful) and lived partly in his house and partly in her own, her child by Hatereliadde, however, being left in her own house in the charge of her mother and died there; that of three children she bore to Toradenia one at least was born in her own house and two of them died there; that after the death of her father, but during her mother's life, Plaintiff and Toradenia separated and she was received again by her mother and brothers by whom she was given out in *Diga* to Dadohagama Tikiry Banda, while she left her

* But see *Ramanathan*, p. 26.

youngest child by Toradenia in her house where he remained until shortly before the institution of this suit.

Eaton, for Defendants, contended that Plaintiff by her *Diga* marriage had forfeited her rights. A Kandyan daughter has no choice as to whether her marriage shall be *Binna* or *Diga*. (*Sawers p.* 4.) The general rule as to *Diga* marriage is that it operates as a forfeiture of all right to the paternal estate. But if she return from her *Diga* village and thereafter get a *Binna* husband, her rights revive (*Sawers. p.* 2.) And if a *Binna* married daughter quit her father's house to live in *Diga* with her husband, she forfeits all right to her paternal estate, unless one of her children be left in her parent's house.— (*Sawers p.* 3.— *Solomon's Manual p.* 17.)

Van Langenberg, for Plaintiff, maintained, 1. That Plaintiff did not forfeit her right by her marriage to Toradenia. 2. The evidence adduced by Defendant failed to establish a *Diga* marriage. 3. That the subsequent marriage with Dadobagama even if *Diga*, would not operate as a forfeiture, the more so as it was proved that the Plaintiff left her son residing in the house of the parents. *Perera's Armour* p. 59. 4. The evidence adduced by plaintiff established her possession of the lands claimed until ouster.

Lawrie, D. J. dismissed Plaintiff's case with costs, holding that plaintiff did not forfeit her right by her marriage to Toradenia, but that her marriage with Dadobagama was a regular *Diga* marriage, and she in consequence lost her right to her paternal inheritance, notwithstanding she left her child behind in the family house. The judgment proceeds:

" She urges that she did not lose rights in her father's property, because she continued to possess a share of it, partly from personally taking a portion of the produce and still more from her youngest son by Toradenia having continued to reside in the *Mulgedara*, and having been maintained from the produce of the fields. I do not think that her personal possession of part of the fields or her participation in the produce has been so proved that I can make it a ground of judgment. As to the effect of leaving her son in the *Mulgedara*, the question, so far as I am able to ascertain, has not been decided. It is

laid down in *Armour** that a *Binna* married woman will not lose her rights, by going off to live in her husband's house, provided she leave one of her children behind, but I do not find it stated that a woman who is given out in *Diga* saves her rights by leaving a child of a former marriage in her *Mulgedara.* In a case of difficulty, I hesitate on the one hand to decide that a child of the family has forfeited her right of inheritance, unless the law clearly establishes a forfeiture; and on the other hand, I hesitate to introduce a new exception to the ancient and recognized rule that a woman in *Diga* has no right in her father's land. After giving the subject my best consideration and after consulting the authorities to which I was referred, I am of opinion that the plaintiff by her *Diga* marriage to Dadohagama lost her right to the lands which she claimed, notwithstanding the continued residence of her blind son in the *Mulgedara.* I must therefore dismiss her action with costs." In appeal, *set aside* and judgment entered in Plaintiff's favour as claimed in her libel with cost of suit.

The plaintiff was first married in *Diga* to Haterehiadde, but she was recalled to the *Mulgedara* by her parents and lived there with her child. She afterwards married Toradenia, and although the evidence is conflicting in this respect, the S. C. concurs with the D. C. that was a marriage in *Binna.* Her right therefore to the paternal inheritence revived. She was subsequently after the demise of both her associated fathers, married out in *Diga* by her brother to Dadohagama, but she left her youngest child of the *Binna* marriage at the parent's house. "If a daughter married in *Binna,*" says the late *Mr. Solomons* in his excellent *Manual* on *Kandyan law* p. 17, "left her parents with her children in order to contract a second marriage in *Diga,* she forfeited for herself and children all right to inherit any portion of her parent's estate, unless she left one or more of the children of the *Binna* marriage at her parent's house." (23 *February,* 1875.)—*Bev. and Sieb. Rep. p* 4.

Widows and Widowers. 3. *Kandy D. C.* No. 31412.—Plaintiffs, as the nephew and heirs-at-law of Ranghamy, claimed certain lands. The first defendant was the childless widow of Ranghamy, and the second, the person to whom

* *Perera's Ed. p.* 59.

she had transferred the lands for services to be rendered. The pleadings put in issue the fact as to whether the lands had been acquired by Ranghamy or whether they were his paternal inheritance, but at the trial it seems to have been assumed that they were inherited by him. It was contended for the plaintiff that by the first defendant alienating the property, she had forfeited her life interest in it, for the defendant that the deed by the first to the second defendant was waste paper, that she had no right to execute it, and that therefore it was no alienation, and that further she had a right during her life to make any arrangement that would secure to her maintenance from her husband's lands. The following is the judgment of the District Judge (Smedley):— There can be no doubt that the deed taken *per se* is a deed in which the first defendant declares that she does alienate the property. Whether she has the power to do so, and whether the deed is consequently legal or not is not now the question : but the Kandyan law is clear upon the point, that the act on the part of a widow of alienating, squandering or committing waste upon her husband's estate *ipso facto* she forfeits her life-interest. The deed sets forth that the lands are first defendant's by inheritance, this defendant's Advocate admits cannot be the case. In the answer she admits that she acquired the property, by which it is clear that she not only intended to alienate the property, but to insist on her right to do so. It is not now attempted to be said that she acquired the property. The case therefore stands thus : the property did belong to first defendant's husband ; the first defendant had a life interest, the widow has attempted to alienate the property, and has thereby by Kandyan law forfeited her right to a life interest. It appears that second defendant has a judgment in his favour against first defendant's husband for the southern four kurunies of the garden, and with this exception, it is decreed that plaintiffs be put and quieted in possession of the land claimed in the libel, the first defendant paying costs of suit. Upon appeal by the defendants, the judgment was *affirmed*. (24 *October*, 1860).—*Bev.* & *Sieb. Rep. p.* 109.

Section 9.

(*From the Legal Miscellany.*)

1. Husband and wife.—2. Parents and children.—3. Widow and widowers.

Husband and wife.

1. *Kandy D. C.* No. 2690-19472.—In a former case, No. 69, the Defendant's father sued the husband of the present Plaintiff, during coverture, for the lands which are the subject of the present action. In that suit the Plaintiff's husband (Selappoo), in his defence, set up a claim to the lands in his own right, and independent of his wife the present Plaintiff. Selappo failed in his defence, and the lands were decreed to the Plaintiff in that case. In the present action the Plaintiff rested her claim entirely in her own right, and independent of her husband. The defendant pleaded the former judgment in case No. 69, with other grounds of defence. After repeated judgments both in the Appellate Court, and in the Court below, the District Court found that the plaintiff had established a title by prescription; but that the former judgment was binding against the present plaintiff on the ground that, as she might have been a party to that suit, the record was consequently in evidence against her, and in support of this position quoted. I *Starkie*, 260.

The Supreme Court thought that this was true as regards the lessor of a plaintiff in an action of ejectment, in which the defendant obtained judgment 2 *Bac. Ab.* 616. Such judgment may at any time be given in evidence against the lessor, for the possession of his lessee is his own possession, and his own title has been in issue. But not so in this case. By the Kandyan Law there is no permanent comunity of goods between husband and wife, and their respective estates remain distinct from each other. The husband in the former suit claimed the land as his own, independent of his wife, and the title of the wife was in no way put in issue. The Supreme Court, therefore, considered that plaintiff was not bound by the judgment against her husband, and that she could maintain this action, and the Court agreed with the Court below that plaintiff proved a prescriptive title.

The judgment of the District Court was *set aside* and the plaintiff was decreed entitled to the lands.—*Dec.* 14, (J) 1847.—*Leg Mis. p.* 432.

Kurunegala D. C. No. 16126.—The Supreme Court decided in case No. 338 Kandy D. C. 26th January 1860, that a *Binna* husband has no right to or interest in his wife's property after her death. The Defendant therefore has no right at all to retain possession of this land, and the Plaintiffs have by means of Defendant's examination given reasonable evidence to shew that they are at least among the next of kin. They are entitled to recover as against this Defendant, without prejudice of course to the rights of co-heirs if there be any.—*June* 14, 1864. *Leg. Mis. p.* 54.

Kandy D. C. No. '19306.—The point in issue in this case is, whether the respondent was the wife or concubine of Appoo Vidane, and it should be open to the appellant to prove that she was of lower caste, which would raise a presumption against the alleged marriage, unless the respondent could shew a due recognition of her as Appoo Vidane's wife; and it was also competent to the appellant to shew, by other evidence, that she was his, Appoo Vidan's, concubine and, if she should be of lower caste, she would only be entitled to acquired property and not to her husband's parveny property, and in this event it would be incumbent on the respondent to prove that the property sought by her to be recovered, is such as she is entitled to (See *Sawers' Digest p.* 38).—*Nov.* 20, 1847 (T).—*Leg. Mis. p.* 429. *

Parents and Children.

2. *Kandy D. C.* No. 31896—The question raised on the pleadings is, whether the original Plaintiff was married in *Binna* or *Diga ;* if the former, she will be entitled to half her father's lands as against her brother, the original Defendant; if the judgment should be in favour of the original Defendant, it is necessary to enquire how his son, the present Defendant, got the land from his father.—(*Feb.* 13, 1866.) *Leg. Mis.p.* 8.

Matale D. C. No. 3574.—Where a proprietor leaves issue by two marriages, his property must be divided into two equal portions, and the issue of each marriage is entitled to inherit a moiety. A daughter

* See *Perera's Armour, p.* 8 § 7.—*Austin, p.* 147.

of the first marriage does not forfeit her right to a moiety of her parents estate by her *Diga* marriage, in favour of her brothers of the half blood, who are entitled only to the other moiety.—(1843.)—*Leg. Mis. p.* 350.

Colombo D. C. No. 4375.—The Supreme Court fully concurs with the assessors that, by the *Kandyan Laws*, the plaintiff, as the only child of *Dingihamy* by his first marriage, is entitled to inherit one-half of his lands, and the children of his second marriage are entitled to inherit the other half thereof, subject to his widow's claim to maintenance from such latter half; even if *Dingihamy* is to be considered the sole proprietor from prescriptive right to his brother's share, by an uninterrupted adverse possession thereof, since his death, which plaintiff admits to have occurred fifteen years ago. [1844.] —*Leg. Mis. p.* 366.

Kegalla C. R. No. 1222.—The land in dispute belongs to one *Lakama* deceased. The defendant is his issue by the first bed—the 1st and 2nd plaintiffs by the second bed,—the 3rd plaintiff (mother of 1st and 2nd) is the surviving widow. The plaintiffs now seek to recover an undivided half of the disputed land. Defendant admitting the above facts denies plaintiffs' right to any share of the deceased's lands, in as much as the 1st and 2nd plaintiffs (daughters) are both married out in *Diga, one* during the father's lifetime, and *the other* after his death, and the widow having left her husband's house and not being in want. The following is the judgment of the Court below :—*Per Davids, (Commissioner.)* "The two cases put in pages 69 and 70 of *Armour* are not applicable here, as the facts differ,—if they prove anything it is that two *Binna* married daughters of one bed do not inherit except under special circumstances. There is a case in *Austin's Reports* 4054, and a paragraph in *Marshall* 59 which would seem to exclude *Diga* married daughters unless they were *sole* daughters. As the widow has left her husband's house, as her children are entitled to no share, as the lands are ancestral, and as the widow is not in want, the plaintiffs' claim cannot be admitted. Plaintiffs nonsuited with costs." In appeal, Mr. Advocate *Ferdinands* appeared for appellants.

Per Curiam] "Set aside, and judgment entered for the plaintiffs with costs. In this case an ancestor died leaving three sons by a first wife, a second wife as a widow, and two daughters by the latter married out in *Diga*. The Court below nonsuited the three last parties who claim with the sons shares in the ancestral property as plaintiffs. The relationship is admitted. Daughters of the half-blood do not forfeit by any *Diga* marriage their right to inherit their parent's estate in favour of their brothers and sisters of the half-blood. *D. C. Kandy*, No. 17,509. *Collective Minutes. June* 24, 1843. *Austin* 88'.—*Dec.* 18, 1866—*Leg. Mis. p.* 113.

3. *Ratnapura D. C.* No. 5951.--The widow of a husband dying *childless* has the same life-interest, and that only in her husband's landed property, whether hereditary or acquired, as the widow of a husband who has died leaving issue. See *Sawers' Digest, p.* 63. Where a deceased had left near relatives, as nephews, his childless widow has only been held entitled to such life interest.—See *Armour's Digest p.* 19, 21.* **Widows and Widowers.**

An intervenient having joined a suit after the plaintiff's Replication to defendant's Answer had been filed, was bound to take up the suit in the stage in which he found it, and no further pleadings therefore ought to have been allowed.—(*C. August* 19, 1851.)—*Leg. Mis. p.* 445.

Kandy D. C. No. 33,964.—The question as to the nature of the interest taken by a *Kandyan* widow in landed property, was very fully considered in the following case, decided by the Supreme Court on the 3rd December, 1861.—

Ratnapura, No. 662½.—"That the decree of the "25th day of January, 1861, be affirmed, except as to "the amount of damages, the plaintiff under the 9th "clause of the Ordinance No. 8 of 1834 being only "entitled to recover the mesne profits for two years "prior to the commencement of this suit. Such profits "to be calculated on the same date as those given by "the judgment of the Court below."

"In this case the plaintiff's father bequeathed "certain lands to a Wihare, of which the first and "second defendants are the priests. This bequest was

* See *Perera's Armour, p.* 26.

"set aside in the Testamentary case No. 156 Ratnapura, "as being contrary to the Proclamation of the 13th "September 1819, when the lands so bequeathed de- "volved on the present plaintiff as heir-at-law."

"The plaintiff now sues to recover the mesne "profits from April 1853 till February 1860, the period "during which the defendants had possession of the "lands. Judgment has been given for the plaintiff "upon evidence, the defendant declining to call any, "contending that the plaintiff should be nonsuited, "because the Testator's widow has not been made a "co-plaintiff."

"The Supreme Court considers that the widow "being otherwise amply provided for by the Will of "her husband, has no interest in the land in question, "and should not be a party to the suit."

"All that a widow is entitled to under the Kandyan "Law is maintenance and support, and for this purpose "she may receive from the heir either a portion of the "produce of the deceased's parveny lands, or she may "have the temporary possession and usufruct of a suit- "able portion of such lands, and in the latter case the "heir-at-law shall perform the Rajekaria or personal "service due on account of that portion. But in this "case being otherwise provided for, the widow does "not require, and is not entitled to further maintenance. "If the lands in question were the *acquired* property of "the Testator, and as such subject to the life Estate of "the widow, it was for the defendant to prove such to "be the case, which they have not done."

"It is moreover clear from the Will, that the "Testator in bequeathing other lands to his widow "while he gave this land to the Wihare, never intended "him to have any claim upon this land in question."

The decisions before that time had been conflicting, and it was the wish of the Supreme Court to establish a permanent rule on the subject. The Supreme Court then decided, that with respect to the family parveny property, the wife has merely a right to maintenance by the heirs, who takes possession of such property, and that she does not acquire a life estate in it.

With respect to landed property *acquired* during the marriage, her rights are different, as is pointed out in the Ratnapura case.

The Supreme Court considers the case in *Morgan Conderlag*, and *Beling p.* 328, and other cases that might be cited, to have been overruled by the Ratuapura decision, to which we adhere.

It follows that, in the present case, the heir had a possessory estate, in the *parveny* lands immediately after the father died, and that the time of prescription against him runs from that date.—*June* 15, 1866.—*Leg. Mis. p.* 32

SECTION 10.

(From Lorenz's Appeal Reports.)

1. **Husband and Wife.—2. Parents and Children.**

Husband and Wife.

1. *Ratnapura, D. C.* No. 6631.—The plaintiff claimed £21 11s. as maintenance for herself and her child. It appeared in evidence that the plaintiff was the *Diga* wife of the 3rd and 4th Defendants, and that the 1st and 2nd were the parents of the 3rd and 4th. There was no allegation whatever in the libel, shewing the liability of the 1st and 2nd except the statement, that the plaintiff's marriage took place with the consent and agreeably to the wishes of the 1st and 2nd. The 4th defendant allowed Judgment by default; but the 1st, 2nd and 3rd pleaded several pleas. First, that the plaintiff had left the 3rd defendant and gone with the 4th, who was in collusion with the plaintiff in this case. Second, that the child was not the joint child of the 3rd and 4th, but was the sole issue of the 4th; and third, that the said child was forcibly taken away by the plaintiff, though the 3rd defendant was ready and willing to support it. Upon these pleadings, the case came on for trial, and upon evidence on both sides, Mr. Miltford gave the following judgment:—" The Defendants' evidence is contradictory. It is admitted that 3rd and 4th defendants and plaintiff are married for fifteen years, and "the defendants have latterly taken her back to her "parents: she has, therefore, a claim for maintenance "from the estate, and the children have also a reversionary interest in their father's property. It is "decreed that defendants do pay plaintiff maintenance

"at the rate of 5 shillings per month, from the 5th "September, 1855, and for the future; and that the "defendants do pay costs." From this the 1st, 2nd and 3rd defendants appealed.

Dias, for the Appellant.] The District Judge did not clearly understand the points raised by the pleadings. The case against the 1st and 2nd defendants was quite different from the case against the 3rd and 4th. There is no cause of action at all against the 1st and 2nd; and if they had demurred, instead of answering, they would have been entitled to absolution from the instance. The effect of the judgment below would be to make parents liable for the debts and defaults of the children,—a doctrine not warranted by any Kandyan Law; on the contrary that law is directly the other way (*Marshall, p.* 351 § 119). With respect to the liability of the 3rd and 4th Defendants, the District Judge has lost sight of the distinction between the plaintiff's personal rights, and those of her child. First, with respect to the plaintiff's personal rights:—A Kandyan divorce is the easiest thing in the world; it does not even require mutual consent. "The husband may, at any time, with or with- "out any just cause, discard his wife, and so may the "wife divorce herself from her husband, whether the "marriage was contracted in *Diga* or *Binna*." (*Armour*, 13).* According to the finding of the District Judge—that plaintiff was taken back to the parents by the defendants—she was a divorced wife; and even admitting that she was repudiated or divorced by the husband, without sufficient cause, she would only be entitled to retain possession of the wearing apparel which her husband had given her (*Armour*, 15).† This view is strengthened by the case put by Armour, of a wife with child at the time of the divorce by the husband without good cause, where she would only be entitled to maintenance until the child should be old enough to be delivered over to the father, (*Armour* 15).‡ This is the law applicable to the case as presented by the plaintiff herself; but if the defendants' story be true the plaintiff is not entitled to any relief. Second.

* See *Perera's Armour, p.* 9 § 11.
† See *Perera's Armour, p.* 14 § 19.
‡ See *Perera's Armour, p.* 14 § 20.

ly, as regards the claims of the minor child:—There is no doubt that the father is bound to maintain his child by a divorced wife, till that child has attained the age of majority (*Armour*, 16); * but the question here is, who is entitled to the custody of the child? The father was willing to accept it, but the plaintiff would not give it up. The Kandyan law on this point appears to be that the father is entitled to the custody of the children of his divorced *Diga* wife (*Armour* 15) †

The case was remanded for a new trial, the plaintiff having no claim against the 1st and 2nd Defendants, and only against the 3rd and 4th, as long as she has the children in her charge.—*Dec.* 15, 1856. *Lor Rep. Part. I. p.* 252.

2. *Kandy, D. C.* No. 23,067.—The Plaintiff claimed certain lands as the sister and heir of H. Perera. The defendant in her answer disputed the plaintiff's right, and claimed the property as the widow of H. Perera, for herself and on behalf of her child. At a previous trial of the case, the District Judge found that the defendant had not been married to H. Perera, but that his child, though illegitimate, was entitled to the property as the acquired property of the father; and gave judgment accordingly. On appeal against that judgment, the Supreme Court was of opinion that the Court below was wrong in departing from the pleadings, the answer having set up a marriage, which had not been proved; and thereupon remanded the case to allow the parties to proceed on amended pleadings. At the second trial, upon such amended pleadings, the Court below held the defendant entitled, on behalf of his child, to the property. **Parents and Children.**

On appeal against this Judgment,—[*W. Morgan* for the plaintiff and appellant.] The questions are—1st. Whether the Kandyan law ought to govern the case. H. Perera was a low-country man, and both he and defendant were Christians. On reference to the Proclamation, it will be found that the Kandyan law does not apply to low-country people. Proc. 2 March 1815, cl. 4. Again by Sec. 8 and 9 a distinction is drawn between native Kandyans and those who merely resort to Kandy. In the Proc. of 1818, p. 224 cl. 7, Kandyans alone are mentioned,

* See *Perera's Armour, p.* 33 § 1.
† See *Perera's Armour, p.* 15.

and in the same proclamation, p 22^9, cl. 51, a provision is made in respect of low-countrymen and foreigners, who are to be subject to the Agent of Government alone, whereas the Kandyans are to be under the Agent and Assessors. It seems therefore clear, that the *lex loci* was not to apply to low-country people. If the contrary were held, it will follow that polygamy and polyandry ought also to be countenanced among them.

2nd. Admitting that the *lex loci* would apply, can an illegitimate child inherit acquired property? The question of marriage cannot be entered into now, for the Court has already held that there was no marriage. *Armour. p.* 135,* is the only authority in support of the view of the District Judge. The District Judge refers to a case in the late Judicial Commissioner's Court; but that is a case of marriage, as the record will shew. *Marshall* refers to this rule, in *p.* 338, cl. 78 of his *Digest*; but it would appear that, that there was a case of a low-caste wife, and it has therefore no application whatever to this case. Now, if the law was doubtful, the Court should at least have taken evidence on the point. The importance of the case demanded such a proceeding. Even if *Armour's* law was good and sound, it did not apply here, because the District Judge found that both were of equal caste. Again, the defendant said, that she had lived with Maddoma Banda, and left him to live with the deceased. In such a case the parentage should have been proved conclusively. 1. *Taylor on Evidence*, 109.

R. Morgan contra.] As to the first point I need only say a few words. The laws of a conquered or ceded country are retained till changed by competent authority. *Clark's Colonial Laws*, 4 5. The proclamation referred to applies only to the mode of Administering Justice. [*Rowe, C. J.* You need not labour that point]. As to the 2nd point, the Kandyan law is as the District Judge has laid it down. Much of the difficulty has arisen from the order of the Supreme Court, in going upon a question of pleading, without deciding upon the merits. The Judge held no marriage *de facto*, but that, under the

* See *Perera's Armour*, p. 34 § 2.

circumstances, the child was entitled. He seems to have held that illegitimate children are entitled to the acquired property. The facts of the case, however, prove a clear marriage; and the Supreme Court, on the last occasion, had sufficient before it to decide on the merits, but it avoided that question by going on a question of pleading. The Kandyan law being somewhat uncertain, we must look to general principles. [*Rowe, C. J.* Is there any case in which *Armour's* dictum has been upheld?] the case referred to by the Judge is set out in his judgment [*W. Morgan.* That is a case of a marriage with a low-caste woman]. It is said that *Armour's* case does not apply in every respect, but if it applies to the children of an inferior woman, *a fortiori* to the children of a woman of a superior caste.

Affirmed.—Sept. '22, 1856—Lor. Rep. Part I. p. 189.

Section 11.

(From Grenier's Appeal Reports.)

1. Parents and Children.—2. Widows and Widowers.

Parents and Children.

1. *Kurunegala, D C.* No. 19,107.—The original owner of the lands in dispute in this case was Menihettirale, who died intestate, leaving three daughters and one son. The plaintiff was one of the daughters and the defendant was the widow of the son. The plaintiff's sisters had been married in *Diga,* and the plaintiff, alleging that she had been married in *Binna,* claimed an undivided half of her father's property. Defendant, in her examination, admitted that plaintiff had returned with her *Diga* married husband to the family property, Migahamulawatte, but added "plaintiff lives in the *same garden* but in a *different house.*" The learned District Judge (*De Saram*) held the plaintiff's *Diga* marriage proved, and proceeded to give judgment as follows:—

The Court must now consider the next point in the case, and that is whether the plaintiff has not, by having returned from her *Diga* village and lived on one of her father's lands for several years, recovered *paraweni* rights and acquired the rights of a *Binna*

married sister. It is proved that the plaintiff returned to her father's house after her marriage in *Diga*, that she was then allowed exclusive possession of half of one of the lands in dispute on which she built a house and in which she had lived ever since. The circumstances under which a *Diga* daughter acquires *Binna* rights are stated in *Armour, p.* 64-63,* and none of them apply to the plaintiff. The plaintiff will be entitled to only a life-interest in half the garden, (*Armour, p.* 67,† *Austin, p.* 22, *D. C. Kandy*, No. 5,137,) unless it was intended that the gift of that garden was to be an absolute one she will then acquire a prescriptive title to it (*Austin, p.* 82, *D. C. Kandy*, No. 16,679). The plaintiff has had exclusive possession of half the garden Migahamulawatta for 15 or 16 years at the least, and as *Prescriptive Ordinance* so strictly defines what adverse possession means, I hold that in the absence of any written agreement regarding the mode of possession intended when half the garden was given to plaintiff, and considering the length of time that has elapsed, the gift to have been an absolute one. Let judgment be entered that the plaintiff be declared entitled to the Northern half of the garden Migahamulawatta described in the Libel, and that her claim to the rest of the lands be dismissed with costs. The defendant to be declared entitled to all the lands in dispute, except the portion of Migahamulawatta adjudged to be plaintiff's property.

In appeal, (*Grenier* for appellant, *Ferdinands* for respondent) *Per* Cayley, J.—"*Set aside*, and judgment entered for plaintiff for an undivided moiety of the lands described in the Libel; but without damages. It appears to the Supreme Court that the case is substantially one in which a *Diga* married daughter returns with her husband to the father's house, and in which the father assigns to them a part of his house, and puts them in possession of a specific share of his lands. In cases of this kind a *Diga* married daughter regains her *Binna* rights.—See *Perera's Armour, p.* 64."—*Gren. Rep.* of 1873, *Vol. ii. Part iii. pp.* 115-116.

Widows and Widowers. 2. *Kandy, D. C.* No. 56,750.—The question in this case was the right of a childless widow to claim

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* *Perera's Edition.*
† *Perera's Edition.*

both life interest and maintenance from the acquired and *parveni* property, respectively, of her deceased husband. The District Judge (MORGAN) put the widow to her election, on the ground that she could not claim both. *In appeal,* there was no appearance for appellant. *Ferdinands* for respondent.—The District Judge's ruling was supported by a clear authority from *Armour, p.* 18,* that the widow could not claim both maintenance and life interest, and there was no appellate decision that he knew to the contrary. The point was a new one, but *Armour* was a safe authority on such questions: *Per* CREASY, C. J. —"*Affirmed*: The defendant has not thought fit to appear to support her appeal. On hearing the Counsel for respondent and on examination of the case, it seems to us that the District Judge did right in following the authority of *Armour.* The Ratnapura case reported in *Legal Miscellany,* decision of 1866, p. 33, differs in its facts from the present case."—*Gren. Rep.* of 1873. *Vol.* ii. *Part* iii. *p.* 25.

SECTION 12.

(*From Ramanathan's Reports.*)

1. Husband and Wife.—2. Parents and Children.—3. Brothers and Sisters.—4. Widows and Widowers.

1. *Newera Eliya, P. C.* No. 2,827.—*Per Curiam.*—Every man is liable under the 37 clause of the Ordinance No. 4 of 1841, who being able wholly or in part, to maintain his family, leaves his wife or his child, legitimate or otherwise, without maintenance or support, whereby they shall become chargeable to, or require to be supported by, others; and there is no exception in the case of a *Binna* marriage when they are thrown upon others for support. The defendant, moreover, may be found guilty as respects the child, although the complainant may fail to prove her liability to support herself.—*June* 5, 1855.—*Ram. Nath. Rep.* 1843-55 *p.* 61. Husband and Wife.

2. *Kandy, D. C.* No. 19,931.—*Per Curiam.*— Parents and Children.

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* *Perera's Edition.*

The plaintiff is decreed to be entitled to recover the whole of the land in dispute with costs.

In this case the original proprietor of the lands in dispute died intestate, leaving a widow and two daughters minors, of whom the eldest married in *Binna*, and was the mother of the plaintiff; but the youngest was married out in *Diga* by her mother, and subsequently sold half of the lands to the defendant by a deed, under which he claims such moiety.

The Supreme Court is of opinion that the mother was entitled to give her said daughter away in *Diga* after the death of her father, and that upon being so married out in *Diga* this daughter was debarred from inheriting any portion of her father's land, the whole of which devolved on her sister married in *Binna.*—*Armour pp.* 24, 114, 117, 118.—* *January* 4, 1851.—*Ram. Nath. Rep.* 1843-1855 *pp.* 156—157.

Kandy, D. C. No. 20,898.—*Per Curiam.*—The decree of the District Court should be reversed, as we consider that the decision of the collective court in the Matelle case No. 3,574 ought to be followed, and that the point was fully considered and decided in it, and also in another case from the late District Court of Kandy, (North) No. 1,333 heard at the same general session.

The *Digest* of Sir Charles Marshall, Tit. "Kandy" par. 68, has been referred to, as favouring rather the rule of division *per capita* than *per stirpes.* The portion of the *Digest* was not published until after the above collective decision; and the judges would certainly incline to such a rule of division as being most consonant to natural justice, if they could view it as an open question, and consider the result of the various conflicting decisions fully justified such opinion, which they cannot do.

The rule that a *Diga* daughter inherits exclusively when she is the only issue, and a moiety, if she is sole child of the first marriage, (although there may be several children of a second marriage), may be referred to as strongly in favour of the rule of division *per stirpes.*

There seems to have been a difference on the point between the Udaratte and Saffragam customs,

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* See *Perera's Edition, pp.* 20. 54. 55.

and much difference in practice has occurred, which renders some legislative provision desirable. Under all the circumstances, the parties will bear their own costs in appeal.—*June* 11, 1851.—*Ram. Nath. Rep.* 1843—1855.—*p* 160.

Kurunegala D. C. No. 14,559.—The Supreme Court affirmed the decree of the Court below as follows:—The defendant has entirely failed to make out the charge of gross profligacy which he brought (most discreditably to himself) against his sister, the plaintiff. As to his charge that plaintiff has degraded the family by marrying a low caste man, it is proved that the defendant drove her to contract that marriage by his ill usage, and his illegal refusal to afford her the maintenance in the paternal house to which she was entitled. For the defendant now to cause the plaintiff's disinherison by setting up that marriage against her would be to allow him the advantage of his own wrong.—*October* 27, 1863. (*Collective*) *Ram. Nath. Rep. p.* 49.

Badulla D. C. No. 1,311.—*Per Curiam.*—Plaintiff is entitled to recover one half of her father's lands, as being the only child by his first marriage, although given out in *Diga* by him, and the other half of the father's lands devolves on the children by his second marriage. The above rule of inheritance has been acted on in several cases, following a collective decision on the point. D. C. Kandy, No. 20,898. D. C. Matale, No. 3,574. D. C. Kandy North, No. 1,333. July 5. 1854.—*Ram. Nath. Rep.* 1843—1855. p. 54.

Kegalla C. R. No. 1,222.—The land in dispute belonged to one Lekama deceased. The defendant was his issue by the first bed,—the first and second plaintiffs by the second bed,—the third plaintiff (mother of first and second) was the surviving widow. The Plaintiffs now sought to recover an undivided half of the disputed land. Defendant, admitting the above facts, denied Plaintiff's right to any share of the deceased's lands, inasmuch as the first and second Plaintiffs (daughters) were both married out in *Diga*, one during the father's life time, and the other after his death, and the widow had left her husband's house not being in want.

The Commissioner non-suited Plaintiffs.

On appeal *Feridnands* appeared for Plaintiffs appellants.

The Supreme Court set aside the order and entered judgment for Plaintiffs, as follows:—

In this case an ancestor died leaving three sons by a first wife, a second wife as a widow, and two daughters by the latter married out in *Diga*. The Court below nonsuited the three last parties who claim, with the sons, shares in the ancestral property, as Plaintiffs. The relationship is admitted. Daughters of the half blood do not forfeit by any *Diga* marriage their right to inherit their parents' estate in favour of their brothers and sisters of the half blood. D. C. Kandy No. 17,509, Collective Minutes, June 24, 1843,—*Austin*, 88. (1866). *Ram. Nath. Rep. p.* 226.

Brothers and Sisters.

3. *Kandy, D C.* No. 1333.—*Per Curiam (Oliphant, C. J., Carr, J.,* and *Stark, J.)*:—Degree modified by it being decreed that the plaintiffs are entitled to recover one-half of the lands in dispute, and that both parties do pay their own costs in this case.

The late father of the second and third plaintiffs and 1st defendant having left issue by two marriages, his estate should be divided into two equal portions, and the defendant being the only child by one marriage, is entitled to a moiety of her parent's estate, and would not forfeit such right by her *Diga* marriage in favour of her brothers or sisters of the half blood.

There appears to have existed a difference between the *Saffragam* and *Udderatte* customs on this last point, as by the Saffragam customs a *Diga* daughter of the half blood would never forfeit by any *Diga* marriage her right to inherit a share of her father's estate in favour of her brother and sisters of the half blood; whereas the old Udaratte customs made a distinction in such cases as to the rights of the daughter when she had been married in *Diga* by her father, and where she married in *Diga* subsequent to his decease. Yet, this distinction never extended to the mother's estate; and even in respect to the father's estate, it does not, from the cases cited at the bar appear to have been adhered to or acknowledged latterly by the Kandyan Chiefs (who have been examined in the Supreme Court as assessors, and as witnesses to the customs), the more

liberal custom having generally prevailed, viz:—that the daughters of the half blood do not forfeit; by any *Diga* marriage, their right to inherit their parent's estate in favour of their brothers or sisters of the half blood.—June 24, 1843.—*Ram. Nath. Rep.* 1843 *p* 1-2.

4. *Kandy D. C.* No. 33,964.—The following is the judgment of the Supreme Court:— Widows and Widowers.

The question as to the nature of the interest taken by a Kandyan widow in landed property, was very fully considered in D. C. Ratnapura, No. 662½ decided by the Supreme Court on the 3rd December, 1861.

The decisions before that time had been conflicting, and it was the wish of the Supreme Court to establish a permanent rule on the subject. The Supreme Court then decided, that with respect to the family *paraveny* property, the wife has merely a right to maintenance by the heirs, who takes possession of such property, and that she does not acquire a life estate in it.

With respect to lands *acquired* during the marriage, her rights are different, as is pointed out in the Ratnapura case.

The Supreme Court considers the case in *Morgan, Conderlag* and *Beling p.* 328, and other cases that might be cited, to have heen overruled by the Ratnapura decision, to which we adhere.

It follows that, in the present case, the heir had a possessory estate, in the paraveny lands immediately after the father died, and that the time of prescription against him runs from that date. (1866). *Ram. Nath. Rep. p.* 190.

Present:—CREASY, C. J., STEELING, J., and TEMPLER, J.

Ratnapoora No. 662½.—The following judgment of the Supreme Court sets out the facts of the case:—

In this case, the plaintiff's father bequeathed certain land to a *Wihare* of which the first and second defendants are the priests. This bequest was set aside in the testamentary case No. 156 Ratnapoora, as being contrary to the Proclamation of the 13th September, 1819, when the lands so bequeathed devolved on the present plaintiff as heir-at-law.

The plaintiff now sues to recover the mesne pro-

fits from April 1853 till February 1860, the period during which the defendants had possession of the lands. Judgment has been given for the plaintiff upon evidence, the defendant declining to call any, contending that the defendant should be non-suited because the testator's widow has not been made a co-plaintiff.

The Supreme Court considers that the widow, being otherwise amply provided for by the will of her husband, has no interest in the land in question and should not be a party to the suit.

All that a widow is entitled to under the Kandyan Law is maintenance and support, and for this purpose she may receive from the heir either a portion of the produce of the deceased's *paraveny* lands, or she may have the temporary possession and usufruct of a suitable portion of such lands; and in the latter case, the heir-at-law shall perform the *rajakaria* or personal service due on account of the portion. But in this case, being otherwise provided for, the widow does not require, and is not entitled to, further maintenance. If the lands in question were the *acquired* property of the testator, and as such subject to the life-estate of the widow, it was for the defendant to prove such to be the case, which they have not done.

It is moreover clear from the will, that the testator in bequeathing other lands to his widow, while he gave this land to the *Wihare*, never intended him to have any claim upon this land in question.

The decree of the Court below is affirmed, except as to the amount of damages, the plaintiff, under cl. 9 of the Ordinance No. 8 of 1834, being only entitled to recover the mesne profits for two years prior to the commencement of this suit: such profits to be calculated on the same date as those given by the judgment of the Court below, (1861) —*Ram. Nath. Rep. p.* 112.

Badulla D. C. No. 501.—The mother of the deceased applied for letters of administration, but was opposed by the *Binna* married widower and the deceased's first cousin of full blood.

The D. J. (Gibson) decided that the applicant's claims hould have precedence.

On appeal, (*Langenberg* for appellant), this finding was set aside in the following terms:—

The Rules and Orders, which are of general application, evidently regard (see sec. 4, c. 6.) the widower as having a preferent right over all others to the administration of his deceased wife's effects.

It may be that formerly, in Kandyan Districts owing to a *Binna* husband being liable to be discarded at any moment by his wife, the right of such a husband was deemed inferior to that of near relatives of the deceased wife. But in the present case, the first opponent was legally married to the deceased, the marriage being duly registered, and consequently as indissolubly allied as other married persons.

Further it is alleged that the deceased left a minor adopted child, who is in the charge and custody of the appellant.

Under these circumstances, without being understood to express an opinion as to the validity or otherwise of the alleged adoption, it appears to us that administration should be granted to the husband of the deceased; and it is accordingly ordered that letters of administration do issue to him, on his complying with the requisite preliminaries. *Per Stewart, J.* (1877).—*Ram. Nath. Rep. p.* 26.

Kandy D. C. No. 270.—After the death of Dona de Silva, the administratrix of her brother's estate, an application was made by the niece of the intestate for letters of administration *de bonis non*, alleging that she and one Louisa Caldera were the sole heiresses at law of the said intestate.

But a counter application was made by the husband of the late administratrix, who stated that he and the minor children left by the late administratrix were the heirs at law.

The main ground on which the niece opposed the appointment of the counter applicant was that the late administratrix was married in *Diga*, and therefore that neither she nor her children were heirs of the intestate.

On appeal, *Langenberg* for appellant: parties domiciled in the Kandyan Provinces are governed by the Kandyan Law, Kershaw's case, Trowell's case (*D. C. Kandy* 55,070, 21st September, 1875), *D. C. Kandy*, 31,944, 5th November, 1863. That law

is operative as a whole or is not operative at all. Portions of it cannot be exempted as having no effect. If the Kandyan law is to rule this case, the late administratrix, as married in *Diga*, is subject to all its incidents. Her husband is not entitled to administration.

Ferdinands, contra: The judgment of the District Court is right, but its reasons are wrong. The husband is the proper person to wind up an estate which had been administered to by the wife. Even if the administratrix had been married in *Diga*, it would not create a forfeiture of her brother's acquired property, as this was: *Perera's Armour p.* 30. In a case of administration, the D. J. ought not to have entered upon the difficult question of domicile. It was premature and—

STEWART, J. did not want to hear him further, but agreeing with the learned counsel, affirmed the judgment, but not for the reasons given by the District Judge.—*Ram. Nath. Rep*, (1877) *p.* 30.

Kandy D. C. No. 28,756.—The circumstances under which this case was this day brought under the review of the Supreme Court, are briefly these:—

The plaintiffs, as sons of one Naida Durea, deceased, claimed certain lands, which were alleged to be in the forcible possession of the defendant, who, in his answer, denied that the first three plaintiffs were the issue of the deceased, and while admitting the remaining four as such, stated that, as son of Naida Durea by his first wife Rankirri, he was entitled to the lands in question and had possessed them for over 10 years.

Polwattegedere Punchee, as widow of Naida Durea, intervened in support of the plaintiffs' claim.

The D. J. held that the intervenient was the wife of Naide Durea; that the plaintiffs were the issue of that marriage; that the lands were possessed by them up to the forcible possession by the defendant, and that the prescriptive possession of the defendant, even if satisfactorily proved, could not prevail or have any effect against the life interest of the widow, the intervenient.

The Supreme Court set aside (21st June, 1864) this judgment, and remanded the case for further hearing, on the ground that the D. J. had not adjudi-

cated on the question, whether defendant was the son of Naida Durea by another wife, nor on the question of possession. "The widow, the intervenient, if there was issue by another bed, would only have a right over half the estate of Naide Durea. For the nature of her right, see 661½ *Ratnapura*, decided by the Supreme Court 3rd December, 1861. Prescription, if satisfactorily proved, would prevail against it. If these lands were the acquired lands of Naida Durea, and not paraveny, the widow might have such a possessory right in them as to make her a tenant for life, and to make the plaintiffs mere remainder men. In that case, prescription would not run against the plaintiffs, though it might run against the intervenient during her life-time. Enquiry should be made as to whether these were the acquired or paraveny lands of Naida Durea, and in every point of view, it is material to ascertain whether defendant is Naida Durea's son by another marriage."

On the second trial, the D. J. was of opinion that the defendant had failed to prove that he was the son of Naide Durea and Rangkiri and also his prescriptive possession. The lands in dispute were admitted to have been paraveny lands, and as there was no proof of the widow (the intervenient) having been provided for by her late husband, the D. J., following the judgment of the Supreme Court in D. C. *Ratnapura* 662½, held that the intervenient was entitled to maintenance and support, for which purpose she was to receive from the heirs of her deceased husband, Naida Durea, either a portion of the produce of his paraveny lands or the temporary possession and usufruct of a suitable portion of the said lands.

The Supreme Court set aside (4th October, 1867) this judgment also and ordered the case to be heard *de novo*. Mr. Berwick held (28th November, 1867) that the plaintiffs and defendant were alike the children of Naida Durea, but as defendant had failed to prove 30 years' adverse possession against the coheirs, in terms of the Supreme Court decision in *D. C. Colombo* 38,329, June 21st, 1866, the plaintiffs were entitled to half, and the defendant, as their step brother, to the other half, of Durea's estate.

No appeal was taken, but on the 29th Septem-

ber, 1875, the defendant obtained permission from the Supreme Court to file his petition of appeal against the finding of Mr. Berwick, on the ground that Mr. Berwick's judgment was based on a misapprehension on the law of prescription in respect to co-heirs.

Upon the lodging of the appeal the plaintiffs petitioned the Supreme Court to permit them also to appeal against Mr. Berwick's finding as to paternity, based as it was on evidence taken at the second trial, and read, but not heard by Mr. Berwick.

Grenier and *Van Langenberg* for defendant and appellant, *Cayley*, Q. A. and *Ferdinands*, Q. A., for plaintiffs and respondent.

PER STEWART, J. set aside; the decision in this case proceeded on a misapprehension of a judgment of the Supreme Court, the then District Judge of Kandy [Mr. Berwick] holding that, according to that judgment, a co-heir could not acquire, as against a co-heir, a title by prescription, although the party has been in undisturbed possession of land for the full period of ten years; a construction entirely erroneous, as pointed out by the Supreme Court in *C. R. Batticaloa* 9655, *VanDerstraaten's Reports p.* 44.

In view of the result of a subsequent case between the parties in respect of other lands (connected case No. 51,506), in which the judgment was based on the ground that adverse possession for ten years was sufficient to give a prescriptive title, it appeared to the Supreme Court that it was only equitable, notwithstanding the lapse of time, to give the defendant in the present case (No. 28,756) an opportunity of appealing from the judgment against him, in order that he might be placed, if the facts permitted, in no worse position than his co-heirs and co-litigants.

We were pressed by the learned counsel for the respondents to remand the case for another hearing. But having closely perused the proceedings, comprising no less than three trials, we are of opinion that there is no need for further protracting the litigation between the parties, which has already extended over a period of more than 20 years, the evidence adduced appearing to us satisfactorily to establish a title in the defendant by prescriptive possession,

It is accordingly decreed that the claim of the plaintiffs be dismissed and that judgment for the lands in question be entered for the defendant, the defendant being hereby declared to be disentitled to damage or compensation from the plaintiffs, in regard to their possession of the said lands up to the notification of this judgment.

Parties to bear their own costs.—(1877)—*Ram. Nath. Rep. p.* 54.

Badulla D C. 19,244.—Plaintiff sued in ejectment, averring that defendant had ousted him from certain lands belonging to him by paternal inheritance.

Upon stating in his examination, that his mother (who was alive) had a life interest in the lands, the proctor for defendant moved that plaintiff be nonsuited, on the authority of cases Nos. 14,823, 14,587 and 19,880 decided in appeal, in which the Supreme Court was stated to have held that the heirs could not maintain an action in support of their shares till after the decease of the mother.

The learned District Judge upheld the objection and nonsuited the plaintiff, though the plaintiff was prepared to shew that her mother was aware of the action instituted by him, and had been given 5 pelas for her maintenance.

On appeal *Van Langenberg* for plaintiff cited *D. C. Ratnapura* 662½, June 15, 1866, and *D. C. Kandy*, 56,750, Grenier, 1873, *Pt.* 3, *p.* 25.

Grenier for respondent relied mainly on the cases cited in the court below.

The Supreme Court thought the District Judge was wrong in construing the words of plaintiff as an admission that he, plaintiff, had no present estate in any of the lands he claimed, particularly as plaintiff's proctor asked to be allowed to lead evidence to prove that the mother had a piece of land of 5 pelas in extent apportioned to her maintenance. Set aside and case sent back for trial.—(1877).—*Ram. Nath. Rep p.* 146.

SECTION 13.

(*From the Supreme Court Circular.*)

1. Husband and wife.—2. Parents and children—3. Widows and Widowers.

Present:—PHEAR, C. J.—STEWART, J., AND CLARENCE, J.

(21 *January*, 1879.)

Ratnapura D. C. No. 99?.

Kandyan law—Diga wife—Desertion by husband—Maintenance—Alimony—Decree for.

A Kandyan took his wife back to her parents' house against her will, and left her there without maintenance.

Held, that the wife had a right to ask the Court to assess and award her maintenance, pending desertion.

This was a suit by a Kandyan wife against her husband for alimony. On appeal by the defendant from a Judgment pronounced against him by the Court below.

Dornhorst appeared for the appellant.

Cur. adv. vult.

The following is the judgment of the Court delivered by CLARENCE, J.,—(30*th January*).

Husband and wife.

The plaintiff and defendant are Kandyans, husband and wife; plaintiff, the wife, sues her husband, the defendant, averring that he deserted her in January last, and she claims to recover from him alimony from that date at the rate of forty rupees per mensem, for her past and future maintenance. The defence pleaded is that there was no desertion, but that plaintiff was guilty of adultery with defendant's brother, Sara, and on defendant remonstrating with her, she left defendant's house in April, not in January. It is admitted that plaintiff is now living with her parents.

Defendant appeals from a judgment decreeing him to pay plaintiff alimony at twenty rupees per mensem, from the 27th January last, until he again maintains her, and casting him in the costs of suit.

The case falls under Kandyan law, and there does

not appear to be any policy ascertainable in Kandyan law to prevent a wife, whose husband refuses to live with and maintain her from claiming from him alimony, until he resumes maintaining her as his wife. A Mahomedan wife undoubtedly could do so, and having regard to the general character of the marriage relation according to old Kandyan law, which is very different from that of Christian communities, we see no reason founded in the public policy of the Kandyan community, against such a claim as the present. Plaintiff is a *Diga* wife, married to live in her husband's house, and her allegation is, that he has turned her out of his house, to live himself with another woman.

The trial has certainly been but an imperfect one. Plaintiff hereby deposed,—

"I was taken back to my parents' house against my wishes. Defendant has not since asked me to return. My parents are supporting me * * * Defendant is now living in the house of Punchi Menika's parents."

How she knows that defendant is living in the house of Punchi Menika's parents, plaintiff does not explain. A Mohandiram is next called, who deposes that he was at the house of plaintiff's parents, when defendant brought her there and left her, saying that he was going in search of an employment' and would leave her there for a few days. The witness also says that he "knows that defendant is living with another woman." Another witness, Ukkuhami, also says, he "knows" the same fact as to the other woman, but neither of them states how he knows it. This is all the evidence for plaintiff with the exception of two witnesses called to prove the cost of maintaining a person of her position.

For the defence, defendant swears that plaintiff was taken away from him by her mother, on the occasion of his having scolded her (plaintiff) for behaviour towards his brother. Defendant calls some other witnesses who are mere vouchers for his side of the case, and prove nothing.

In this state of the evidence, the case has obviously been imperfectly investigated, but as the evidence stands, there being direct evidence of defend-

ant having left plaintiff at her parent's house, which is not met by anything but vague and general assertion on defendant's side, this evidence on plaintiff's side seems to preponderate over that on defendant's side. Defendant, moreover, admits having granted a gift-deed in favour of Punchi Menika, the woman for whom plaintiff accuses him of leaving her. Defendant attempts to explain this by saying that he granted it in order to forward a marriage between his brother (the brother with whom he says that plaintiff misconducted herself) and Punchi Menika. The terms of the deed, however, express the gift as made in consideration of "love and affection" towards her, and of her being "humble and obedient" towards himself.

There thus seems reason to consider that the District Judge's view of the facts is substantially right, and in this view plaintiff is entitled to call upon her husband, defendant, to maintain her in her parents' house until he is prepared to take her back and maintain her in a becoming manner in his own house. The decree to which plaintiff is entitled will be a declaratory and mandatory order in the nature of an injunction, fixing the amount to be paid by plaintiff to defendant for that purpose and enjoining him to pay it. There does not appear to be any ground upon which plaintiff can recover anything from defendant in respect of her past maintenance before action brought for the time during which she has in fact, according to her own account, been maintained by her parents.

The decree appealed from must be varied. In view of the decree appealed from, the decree will be,—

It is declared that plaintiff is entitled to receive from defendant twenty rupees *per mensem* as maintenance, until such time as defendant is ready to receive her into his house and maintain her in a becoming manner as his wife; and it is decreed that defendant do pay plaintiff forthwith maintenance money at the rate of twenty rupees *per mensem* from the 25th April 1878, (the date of the institution of the suit) to the end of last month, and do also pay plaintiff a further sum of twenty rupees at the end of the present and every future month respectively,

and that defendant do pay plaintiff's costs in the District Court.

No order as to appeal costs.—*Sup. Court. Cir. Vol. II. No. 9. p. 33.*

Present :—Burnside, C. J., and Lawrie, J.

(*30th May and 10th June*, 1884.)

Ratnapura, D. C. No. 2416.

Prescription—Payment of tax—Adverse possession—Kandyan Law—Husband and wife.

Where two brothers married two sisters and both families continued to live in one house on the ancestral property:

Held, that the commutation registration in the name of the widow of one of the brothers, and the payment of paddy tax in her name for a period of 38 years, was not of itself sufficient to create a prescriptive title in her as against heirs who had continued to reside on the same ancestral property with her during the whole of that period.

Held, further, that the fact, that after the death of the sisters the other became the associated wife of both brothers, did not constitute her the heiress of the brother to whom she had not been conducted, so as to entitle her to inherit as against the children of the associated husband and wife.

This was an appeal by the plaintiff from a judgment of the District Court dismissing plaintiff's action.

The facts sufficiently appear in the Judgment of Lawrie, J.

VanLangenberg for plaintiff-appellant.,

Browne for defendants-respondents.

Cur Adv Vult.

On the 10 June the following judgments, affirming the decision appealed from, were delivered:—

Lawrie, J.—Both parties are agreed that the land in question belonged to Mohottala, but, as I shall afterwards have occasion to point out, this does not seem to be very certain. Mohottala had a brother, Muhandiram.

Mohottala and his brother Muhandiram married sisters, Hami Mahatmeya and the plaintiff. The

two brothers and their wives lived in the same house.

The District Judge, who had just stated that he required clear proof of an associated marriage, said "the inference to be deduced from these brothers and their wives living together need not be mentioned."

If he meant by that the plaintiff was the wife not only of Mohandiram, to whom she had been conducted but also of Mohottala, that is exactly what the plaintiff wished the court to believe.

I venture, however, to differ from the learned Judge, and to state that as my experience of my Kandyan custom, that when two brothers have each conducted a wife to the family house and live there, there is no room for the inference that the marriage became associated or mixed.

In a Kandyan house each married pair live in a separate room, and the children born by each of the wives are, by Kandyan Law, regarded as the children only of the man to whom their mother was conducted, unless there be evidence that subsequent to the marriage an unmarried brother became, by consent of both husband and wife, an associated husband. That is consistent with the Plaintiff's evidence. She says she did not live with Mohottala as his wife until after her sister's death, and her case is that she had children to Muhandiram alone who succeeded to his lands to the exclusion of the child of her sister; but if both sisters were the wives of both brothers, Hami Mahatmey's son (second defendant) would have had right to half of Muhandiram's land, which he seems neither to have claimed nor possessed.

I take it then, as admitted by both parties, that prior to the death of Mohottala's wife there was no associated marriage.

Did Mohottala's wife predecease her husband? The plaintiff says she did, while the 2nd defendant (her son) and the korala (her brother) say she survived him. The Korala's evidence on this point, however, is hardly not consistent with his statement that he registered the plaintiff as owner of half of Mohottala's land, because she said she had assisted Mohottala. By the assistance the Kandyans usually mean assistance when a man is old and sick and dying, and I cannot but think that the registration in

the plaintiff's name would not have been made if, at that date Mohottala's own wife had been alive.

But even if Mohottala did survive his wife (Hami Mahatmeya) and continued to live in the same room with his children, I do not think that Kandyan custom leads us to infer that he forthwith joined his brother Muhandiram as the husband of the plaintiff. I do not say that such would have been thought illegal, or even very unbecoming, but I do not think it is an inference which should be drawn without proof. On the evidence before me, I think that the plaintiff was not Mohottala's wife. Even had she proved she was, she would not have succeeded by law to half of his lands on his death. She would have had right to maintenance only, and the property would have passed to his children.

Her strength lies in the evidence of her continued possession of the lands: it is a possession which, perhaps, is not adverse to her own children, but what she seeks to prove was possession adverse to her nephew, the 2nd defendant.

Apart from the registrations in her name and of the payments of tax by her son, or by her brother on her behalf, the proof of possession is not conclusive. The crop of all the family lands was brought to the family house in which all lived. There is no evidence as to any separation of the crops, or of the storing of the crop of some fields in one granary, and of others in another granary. Probably, all the family lived somewhat scantily on the whole crop, and had but little to save or sell even in the best years. The plaintiff after her husband Muhandiram's death, must have been an elderly lady, and did not interfere with the cultivation of fields.

The strong point in the registrations in her favour I find difficulty in reconciling those registrations with the admitted fact that the whole fields belonged to Mohottala,

The whole was not his by inheritance, for he had at least one brother, Muhandiram, and we hear of no division of the family estate, nor is it said that these fields belonged to Mohottala's father.

In the registration of 1833 I find that the whole field did not belong to one man, but to two. Neither of them was Mohottala. There is nothing to shew

how between 1833 and 1845 the two portions had been acquired by Mohottala. Certain it is that in 1845 the plaintiff is entered as owner of half. We have no evidence as to who was registered as owner of the other half, perhaps the second defendant, but I have hesitation in presuming that without proof.

The registrations of 1870 and 1880 relate only to one-half of the land, and in both cases the plaintiff is registered as owner.

I have felt hesitation in rejecting the plaintiff's claim founded on possession proved by her having lived for more than 40 years in the house to which the produce was brought, but in which, it must not be forgotten, the defendants also lived. She was all that time registered as owner, but that is not in itself conclusive, as it is not proved to have been with the defendants' consent. For part of the time at least she paid tax; the payment of tax is important, because, for a portion of the time, had the second defendant been the real owner, no tax would have been exigible as he was arachchi of his village and his own lands were free from tax. But, on the whole, as the plaintiff had no right to these lands as Mohottala's widow, for she was never his wife—and if she were, she was not his heir, I arrive at the conclusion that the judgment should be affirmed.

Burnside, C. J.—I concur. The plaintiff has failed to establish that she was the wife of Mohottala, and, even if she were, she could not claim as heiress to his lands. She at the most could only have been entitled to maintenance, which I think she was receiving out of the profits of the land, and upon which she now claims a title by prescription. Even if she were registered as owner, that in itself gave her no title to the land as against the proper heir.—*Sup. Court Cir. Vol.* vi. *No.* 22. *p.* 85.

Present:—PHEAR, C. J., CLARENCE, J., AND DIAS, J.

(*July 9th,* 1878.)

Kurunegala, D. C. No. 20456.

Under Kandyan Law, ancestral property, when the direct line of descent is broken, goes over to the next nearest line issuing from the common ancestral roof-tree.

Consequently where the owner of paternal *paraweni* property died, leaving him surviving the sons of his paternal uncles, and the son of his mother by a second husband.

Held, that the sons of the paternal uncles inherited the lands.

2.—The following judgment of the learned District Judge (Mr. J. H. de Saram) explains the facts of the case:— Parents and Children.

"This is a case involving a question of succession, under Kandyan Law. The facts as admitted, and on which the case was submitted for decision, are as follows:—

"Appuhami, the proprietor of the lands in dispute, died in March, 1877, without issue and left no widow. The plaintiffs are the sons of Appuhami's paternal uncles, and the defendant is Appuhami's step-brother, that is, the son of his mother by her *second husband*. His (Appuhami's) mother is dead, and the lands were his paternal *paraweni* property. The question is, who, under the above circumstances, is his next of kin?

"The policy of the Kandyan Law in respect of *paraweni* property is, that it reverts to the source whence it came, failing wife and children. In this instance, it must revert to Appuhami's father's family, that is, to his father's brothers, or those brothers children, viz., the plaintiffs, (*Marshall's Judgments, p.* 347, sec. 105). *Sawers* p. 13, quoted by defendant's proctor, evidently refers to *acquired* property. Let judgment be entered for plaintiff for the land in question and costs."

On appeal, the judgment of the Court was delivered as follows, by PHEAR, C. J:—

The judgment of the District Court is clearly right. The governing principle seems to be that the ancestral property, when the line of descent is broken,

goes over to the next nearest line which issues from under the common ancestral roof tree. Here, the defendant evidently does not trace his line of descent from the same ancestral roof as the deceased Appuhami. Although his mother was also Appuhami's mother, it must be assumed that, on her second marriage, she departed from her husband's family and entered that of her second husband. Even if she had in fact taken a *binna* husband into the house of her deceased husband, and if a second family had been born to her, and lived there, yet in regard to the inheritance of the deceased husband's property, both she and her second set of children must always be treated as if they stood outside. See *Armour* (Perera's edition p. 37, sec. 9.) Indeed, all the authorities quoted lie one way. For sec. 82, p. 339 *Marshall*, upon which Mr. Van Langenberg rested his appeal, is not inconsistent with the others. In the case there mentioned, *Mr. Sawers* supposes the mother to take her husband's property by inheritance *after* and *from* a son by him; then upon her death, leaving a son by a second husband, this son takes the property from her, in this way becoming an *ultimate* not immediate, heir of his half-brother. And *Mr. Sawers* says this takes place reciprocally, that is, that the same rule is applicable whichever father is spoken of. Probably, it may well be doubted whether this is good Kandyan Law. But at any rate, it does not clash with sec. 85 on the next page of *Marshall*. In sec. 84 of p. 340 *Marshall*, the half-blood have same father, and in fact constitute the next line issuing from the same ancestral roof.—*Sup. Court Cir: Vol. I. p. 3.*

Present:—CLARENCE, A. C. J., AND DIAS AND GRENIER, JJ.

(2nd and 16th May, 1882.*)*

Kandy, D. C. No. 88284.

Kandyan law—"Acquired" land—Inheritance.

A Kandyan bought land, gifted it to a son, K., and died, leaving him surviving K., a sister and brothers and their mother. K. afterwards died childless and instestate, leaving him surviving the sister and brothers and mother.

Held, affirming the decision of the District Court, that the land was to be considered as the "*acquired*" property of Kuda Heneya, and as such passed on his death to his mother.

The sole question raised upon this appeal was whether, upon the death of one Kuda Heneya, who died childless and intestate, a certain piece of land, of which he died the owner, passed to Kuda Heneya's mother, through whom plaintiff claimed, or to Kuda Heneya's brothers and sister, through whom defendant claimed. The land had been bought by Kuda Heneya's father, who, in his life time, gifted it to Kuda Heneya, and died, leaving him surviving Kuda Heneya's mother, and brothers and sister.

The District Judge, holding that the land must be considered the "*acquired*" property of Kuda Heneya, and that on his death it passed to his mother, upheld plaintiff's claim of title.

Defendants appealed.

Browne for defendant-appellant.

This land having been obtained by Kuda Heneya as a gift from his father, is impressed with the character of inherited or ancestral land, rather than acquired. (*Marshall*, 347, *Armour*, 23.)

Van Langenberg for plaintiff,-respondent, referred to *Marshall*, 338.

Cur. adv. vult.

Clarence, A. C. J.—I have had the advantage of reading the jugments prepared by my brothers, and I agree in the view taken by them. There seems to be no doubt but that if this property is to be considered as the "acquired" property of Kuda Heneya, it devolved on his death, intestate and *improles*, upon his mother. It appears that Grenier, J.—Two questions were raised on this appeal—(1) whether the portion of land in dispute between the parties was the *paraveni* or the *acquired* property of Kuda Heneya, and (2) whether Punchy Ridy, Kuda Heneya's mother, was his sole heiress-at-law.

Mr. *Browne*, for the appellant, contended that the land was paraveni and not acquired, and in support of his contention cited a passage from *Armour*, p. 23, as to the meaning of the term *Lat himi*, or the right of acquest under the Kandyan Law. But that passage contains no definition of the right, but mere-

ly gives a few illustrations of the manner in which it may be acquired. There is, however, a legal definition of *Lat himi* in Chap. 6, section 1, of *Armour**, to the following effect:—"This right, viz., *Lat himi* or right of acquest to property is acquired by gift or bequest, by purchase, by prescription, or otherwise." Now, in the present case, Kuda Heneya's title to the land was founded on a deed given him by his father, and whether that deed be regarded as containing a gift or a bequest, the property should be regarded as Kuda Heneya's *acquired* and not paraveni property.

The question as to the mother's right as sole heiress to her son Kuda Heneya, who died intestate and without issue, leaving two brothers and one sister, was not contested by Mr. *Browne*, except on the footing that the land was paraveni property. Mr. *Van Langenberg*, on the other hand, contended that whether the land was paraveni or acquired property, the mother was, all the same, entitled to succeed as sole heiress. It is unnecessary for me to express any opinion on this point, as it does not fairly arise for adjudication in this case. The land being, as above shown, *acquired* property, and in no sense whatever paraveni (Kuda Heneya's father himself having purchased it in 1853), the mother is entitled to succeed. (See *Armour* † p. 88; *Sawers* p. 8; *Austin* p. 133.) No question was raised in the argument before us as to the nature and effect of the right acquired by the mother as heiress, whether it was a permanent or merely a life interest; and as the petition of appeal is also silent on this point, I am not disposed to interfere with the judgment as it stands.—*Sup. Court. Cir. Vol. V. p.* 46.

Present:—DIAS, A. C. J., AND LAWRIE, J.

(*February* 3 *and* 28, 1888.)

Kegalla D. C. No. 6300.

Kandyan Law—Inheritance—Intestate—Mother of Kandyan child—Heir at Law.

By Kandyan Law the mother succeeds as heir at law to the whole of the moveable and immoveable property of her child who has survived its father—

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* *Perera's Edition.*

† *Perera's Edition.*

leaving no full brother or sister surviving—and died intestate.

The plaintiff claimed certain undivided shares in lands which he had purchased from the widow of one Yahapathami and his sister, the first defendant, had possessed these lands undividedly, that Yahapathami had died intestate leaving children to whom his share in the lands in question had descended, that these children had all died intestate, and that their share in the property in question had devolved on their mother (the plaintiff's vendor); the plaintiff complained that he had been unlawfully deprived by the first defendant of the shares of the land purchased by him, and prayed that he might be declared entitled to and quieted in possession of the same, and that the first defendant be ejected therefrom. The other defendants were joined in the action as being entitled to small shares in certain of the lands claimed.

The first defendant answered denying that Yahapathami had left any issue surviving him, or that the plaintiff's vendor was entitled by inheirtance to any share of the lands in dispute.

At the trial the District Judge held it established, that Yahapathami had died intestate leaving one child surviving him, that that child died leaving no issue, and that the child's mother, the plaintiff's vendor, succeeded as heir to the whole of the child's property, and had full title to convey to the plaintiff the shares of the several lands claimed. The District Judge was of opinion, however, that the plaintiff's suit was a suit in ejectment, and that as the lands were held undividedly with the defendants, the action as instituted did not lie, and he absolved the defendant from the instance with costs.

From this judgment the plaintiff appealed.

Dornhorst for the plaintiff and appellant.

Alwis for the 1st defendant and respondent.

Cur. adv. vult.

On February 28th the following judgments were delivered:—

LAWRIE, J.—The District Judge was right in holding that, by Kandyan Law, the plaintiff's vendor was the heir of her child, who died without issue, and without leaving brothers and sisters.

The Counsel for the respondent pressed on us that the passage in Sawers' Dig., page 8, repeated in Marshall, page 338, paragraph 79, shewed that a mother has only a qualified right of life-rent in her deceased child's property, but I think that, in this passage, Sawers is dealing with the case of a mother's rights when her deceased child had full brothers and sisters.

The extent of a mother's rights is clearly stated in the *Niti Nigandua*, a Sinhalese treatise on Kandyan Law, compiled before Sir Charles Marshall wrote, but which was not printed until a translation by Armour appeared in the "Ceylon Miscellany," in 1840, under the title of "A Grammar of Kandyan Law"; this, and the later edition by Perera, are leading authorities in questions of Kandyan Law. These lay down that the mother is sole heiress to her child, who had survived his or her father, and died without issue, and left neither full brother nor full sister; but if the deceased child left a full brother or sister, that brother or sister will be entitled to deceased's share of his or her paternal paraveny land in preference to the mother. *Niti: Nig.* pp. 16, 105, 113; Armour's Gram. pp. 16, 130; Perera's Armour, page 85.

This is supported by decisions of the Judicial Commissioner of the Kandyan Districts, under date 16th August 1822, 7th September 182 ; 3rd October 182 ; and by the Kandy District Court cases Nos. 1471, 6938, November 15; 13110, 17078, and 21994. The last is reported in Austin, page 133.

This is the Judgment in the Judicial Commissioner's Court, on 7th September 1824. "The Chiefs, after due deliberation, give it as their unanimous and unqualified opinion, that a mother is the heir of her only fatherless child dying without issue ; however the property the child dies actually possessed of may have been acquired, whether it shall have been the paraveny property of the child's father, or accrued to the child in any other way, and that to the exclusion of the child's father's family. Further, that this case has been decided upon true principles of Kandyan law as applicable to the same."

The District Judge, while upholding the plaintiff's title to one-half of the land, absolved the defendants from the instance, because the plain-

tiff prayed for a decree in ejectment. I do not think that the libel can fairly be read as praying that the defendants be ejected from the whole land, but it must be admitted that a decree in ejectment is unsuitable in cases where the defendants are equally with the plaintiff entitled to possess, and to share in the produce.

Where one of several co-owners has been prevented from taking his share by one or more of the others, he is entitled to a declaration of his right, and to a decree ordering him to be put in possession of his share.

DIAS, A. C. J.—This is a pure question of Kandyan law, and my brother LAWRIE has so fully gone into the matter, that I need only say that I concur in his opinion.

Set aside; and judgment entered for the plaintiff quieting him in possession of the shares of the lands claimed.—Sup. Court. Cir. Vol. viii. *p.* 135.

Present:—BURNSIDE, C. J., CLARENCE and DIAS, JJ.

(August 23 *and October* 11, 1889.*)*

Kegalla, D. C. No. 5994.

Kandyan Law—Inheritance—Father married in Binna inheriting child's property.

The daughter of Binna-married Kandyan parents died, leaving her surviving, father, her mother's mother, and her mother's uterine half-sister.

Held, that the lands of the deceased, inherited from her mother, devolved on her maternal relatives in preference to her father.

Plaintiff, as sole heir of his daughter, claimed a declaration of title to undivided shares of several lands as against defendants. The first defendant was the mother of plaintiff's late wife, the second was her half-sister, and the other four defendants were owners of the remaining shares in the lands. The District Judge non-suited plaintiff, holding that the first and second defendants inherited in preference to plaintiff. The plaintiff appealed.

Dornhorst for the appellant.
Browne for the defendants.

Cur: adv: vult:

On October 11th the following Judgments were delivered :—

Burnside, *C. J.*—I have had the benefit of reading my learned brothers' Judgments before consulting the authorities upon the very uncertain question on which this appeal rests. As a fact, I think we must conclude that the property was the inherited property of Dingiri Amma, through her mother, through whom the plaintiff claims as her father. I think the authorities support either proposition, that the Binna-married father succeeds to the property in default of direct issue, or that the collaterals in the direct line do. I am inclined to uphold the claim of collaterals in the direct line of inheritance from the mother, and the District Judge's judgment is in my opinion right, and should be affirmed.

Clarence, J.—The District Judge, in his judgment, has set out very clearly the facts in this case, and the issue between the parties involves a difficult point of Kandyan Inheritance Law.

The facts are these. Muda i Hami Korala owned the land in question. It was his *paraveni* property. He married a widow (first defendant) who had a child (second defendant) by her first husband. The issue of the marriage of the Korala and first defendant was one daughter, Dingiri Mahatmaya. In 1877 plaintiff, then a peon in the Korala's house, was married in *Binna* to Dingiri Mahatmaya. In 1863 the Korala had made by deed a disposition of his landed property, giving an undivided half-share to Dingiri Mahatmeya, with the reversion to another one-fourth on the death of her mother, first defendant. Dingiri Mahatmeya, after her Binna marriage with plaintiff, gave birth to a daughter, whose birth she survived for a few days only. Plaintiff brought up the daughter and succeeded, in spite of the opposition of the defendants, in retaining possession, as guardian of his infant daughter, of her share of the Korala's lands. The plaintiff's infant daughter afterwards died while still a very young girl, and the defendants at once assumed possession of her share of the land. When the Korala died, we do not know.

The question is, whether plaintiff inherits his deceased's child's land to the exclusion of the defendants. I agree with the District Judge that, for the purposes of this question, we must regard the land as property coming to her by inheritance. It is clearly inherited property, and not acquired. She inherited it from her mother, who had obtained it by her father's gift. In my opinion it it ancestral property derived from her paternal grand-father, the Korala, within the purview of Kandyan Law.

Upon the point thus raised, Marshall's digest and Perera's Armour leave room for some doubts. Pages 76 and 77 of Armour, relating to Jataka Uruma, or father's inheritance from his deceased child, certainly seem to lay down that when a Binna wife dies, leaving a husband and a child who thereon inherits the mother's land and then dies, the father, who had duly cared for the child (as the plaintiff has done) may inherit the land which had come to the child from her mother, it the child left no brothers and sisters. The 4th paragraph on page 77 would, however, seem to suggest that this right of the child's father operates only to the exclusion "of distant maternal relations (mother's grand-uncle's son, for instance.)"

On the other hand, Marshall, page 344, lays it down that the father succeeds to the deceased child's property acquired otherwise than by inheritance from the mother, and not to the property derived by maternal inheritance; and that this latter will go to the maternal uncles or next of kin on the mother's side.

I have searched through the *Niti Niganduwa*, but can find no authority there directly applying to this point. At page 111 occurs this passage "Again, inasmuch as the property of the mother is on her death, inherited by her child or children, if she dies leaving her husband, he may, on behalf of the children, take care of the lands, &c, so inherited, but he cannot appropriate or alienate any portion of them."

This again leaves the matter doubtful. Admittedly, the child's children would take to the exclusion of the child's father, and this passage seems to relate only to the custody of the lands during the child's

minority, and does not say what is to happen if the child should itself die improles.

At page 113 of the same authority it is laid down that when a binna-married woman dies leaving her husband and a diga-married sister's child, the niece, and not the husband, will inherit, but that the husband, if he does not at his wife's death leave the premises (*i.e.*, the binna-marriage house) may remain in possession of the lands during his life, but may not alienate.

This plaintiff admittedly left immediately on his wife's death the house in which he had lived with her.

This last passage in the *Niti Niganduwa* seems to favour the conclusion that the binna husband can have no more than a right to remain in possession during his life, provided he continues in the binna-marriage house, which the plaintiff did not.

The general principal of Kandyan Law no doubt is, as Sir J. Phear pointed out in the case reported in I.S.C.C. 3, that when the direct line of descent is broken the ancestral land goes over to the next nearest heir emanating from the source whence the land came. Here the land came *immediately* from the child's mother (wife of plaintiff), but in its origin it was ancestral property of her father, and the defendants are merely the widow and step-daughter of the latter.

I have experienced very great difficulty in arriving at any Judgment in this case, but in the result I feel unable to dissent from the judgment in the Court below, assented to as it is by my brother Dias.

Dias, J.—The property in dispute belonged to one Dingiri Amma deceased, who was the daughter of the plaintiff by his binna-married wife. Dingiri Amma left no children, nor any brothers and sisters, full or uterine. The original owner of the property was one Mudalihamy Korala, who married the first defendant. The second defendant is a daughter of the first by a previous marriage.

The Korala, in his life time, made a distribution of his property, and by a deed of May 13, 1863, he gave one-fourth of his estate to his own daughter, who subsequently married the plaintiff in binna and had a daughter, Dingiri Amma; and it

is this daughter's property which the plaintiff claims as her father. With regard to the nature of the property—that is, whether acquired or inherited—I agree with the District Judge that it is the inherited property of Dingiri Amma. Though the property was acquired by her mother under the Korala's deed of 1863, she herself inherited it from her mother, and the question is whether her father, the plaintiff, is her heir to the property. It is admitted that her parents were married in binna, and that she died childless and left neither brothers nor sisters.

The District Judge disallowed the plaintiff's claim, and I think his opinion is borne out by the authorities. (See Marshall, p 344 paragraph 97). Armour's opinion *(Perera's Armour pp. 76, 77)*, seems to conflict with the law as laid down in Marshall, but I think Marshall's opinion is entitled to preference, as he is the best writer on Kandyan law, and his opinion is supported by another writer (see Sawers p 14.) I am not aware of any case in which this question of Kandyan Law was authoritatively decided, but in the absence of precedents I think we may safely adopt Sir Charles Marshall's view of the law, and affirm this judgment.—*Sup. Court Cir. Vol.* IX. *p.* 34.

Present:—BURNSIDE, C.J., CLARENCE and DIAS, JJ.

(*November* 15 *and December* 6, 1889.)

Kandy, D. C. No. 1724.

Kandyan Law—Succession—children of two beds—per capita or per sterpes.

By Kandyan Law, where a person dies intestate leaving issue by two or more beds, his estate is divided among his children *per sterpes*, and not *per capita*.

So held by BURNSIDE, C.J., and DIAS, J. (*dissentiente* CLARENCE, J.) following D. C. Badulla No. 14512. II. *Lorens* 27.

Plaintiff, as the only child of one Horetella by the second bed, sought a declaration of his title to one-half of Horetella's lands, as against defendants, some of Horetella's children by the first bed, who contended that the lands should be divided among the children of both beds *per capita*. The Acting

District Judge decided that the division should be *per sterpes*, and gave plaintiff judgment.

The defendants appealed.

The appeal was first argued on October 4th before CLARENCE and DIAS, JJ. By direction of their Lordships it was now re-argued before the Full Court.

Cooke, for the defendants, cited Marshall's *Judgments*, p 333; Armour's *Kandyan Law* (Perera's edition), pp. 69, 70, 72.

Dornhorst, for the plaintiff, cited D. C., Badulla, No. 14,512, 2 Lorenz 27.

Cur. adv. vult.

On December 6th the following judgments were delivered:—

BURNSIDE, C.J.—If my decision in this case were primæ impressionis, I do not hesitate to say that, following the reason and fairness of the matter, I would be prepared to hold that the children of the first and second marriages would take per capita, and not per sterpes; but the point has been already decided by the solemn decision of this Court in the reported case in 2 Lorenz. p. 27 and also, as was stated by counsel in argument in that case, in several collective decisions of this Court. I cannot regard the dicta in Marshall and Armour, and even the Niti Nigandúwa, whatever may be its pretensions as a legal authority as sufficient to disturb a solemn decision of the Court. It is better that there should be a fixed rule rather than one varied from time to time, as opinions may disagree as to what may be reasonable or fair. Upon the second question, I can only say that the issue of legitimacy is not one that we are now called on to deal with.

I must affirm the District Judge's judgment, with costs.

CLARENCE, J.—The point for decision upon their appeal is, whether the children of Horatella, by her two husbands, inherit her acquired property in shares computed per capita or per sterpes. By her first husband, Horatella had six children, the three defendants and three others not parties to this action. Plaintiff is the only child of her second marriage.

Defendants' counsel proposed to argue upon the appeal a further point embodied in the petition of ap-

peal, but not raised by defendants' pleadings, viz, that plaintiff is an illegitimate child of Horatella, and as such does not inherit anything. This contention appears to have been embodied in the petition of appeal in consequence of an admission noted as made at the trial by plaintiff's curator *ad litem* as to Horetalla's marriage with him not having been registered. We declined, however, to allow that point to be argued, defendants not having raised the point by their pleadings.

Upon the question which we have to decide, *viz*, whether the children of the two beds inherit their common parent's property *per capita* or *per stripes*, authorities are conflicting. In *Perera's Armour*, at p. 69, it is said that where a father left a son and infant daughter by one wife and a son by a second wife, his lands devolved on all three children, in equal shares, *i.e. per capita*. The instances recorded in the *Niti Nighanduwa*, at pp. 78 and 79, are inconsistent with *per stripes* inheritance, and, when not complicated by matters of *diga* marriage and other incidents, are distinctly instances in which the children of the two beds inherited *per capita*. In *Sawers*' compilation the question is noted as a disputed one. The question is treated at p. 333 of Sir C. Marshall's work, in a section which, after reciting the conflict of opinion among the Kandyan chiefs, concludes as follows :— "This rule of division" (*per capita* rather than *per stripes*) "certainly seems the most consonant to natural justice, and has been acted on by the "Supreme Court." The learned Chief Justice then proceeds to cite a Ratnapura Case, in which the intestate had left two children of one bed and one of another bed, and the Supreme Court, reversing a decision of the court below, by which the property had been adjudged in halves, one-half to the children of one bed and one-half to the children of the other bed, "decided in favour of the equal division among all "three children." In that case the Supreme Court observed that "as far as this court had been enabled "to ascertain the right of authority, founded both in "opinion and precedent, is in favour of division among "all the children of different marriages equally; that "this practice would certainly seem to be more con-"sonant with the principles of equitable distribution,"

and that the injustice of the other mode of distribution became the stronger in proportion as the children of one bed outnumbered those of the other.

As against this strong authority, which I should have supposed conclusive, we have, however, a late case in 1857 reported in 2 *Lorenz* 27, in which the Supreme Court adopted the *per stripes* division. No reasons, however, are assigned for the decision or in effect reversing the rule laid down after solemn consideration in the case noted by Sir C. Marshall. In the case now before us the learned Acting District Judge, whose long Kandyan experience lends weight to his opinion, treats the division *per stripes* as a "well established principle of the Kandyan Law."

We have now as a Court of Appeal to give our decision upon the point, and I have no hesitation in saying that, amid the conflict of authority, the decision of this court noted by Sir C. Marshall in favour of the distribution *per capita* commends itself to me as the one which we should definitively follow. It was a decision solemnly arrived at after a consideration of the conflicting native opinions and the natural equity of the matter; and it certainly, apart from all question of precedent, is most just that the children of the two beds should all share and share alike. When all the children are related in precisely the same degree to the ancestor from whom the property descends, no reason is apparent for distributing on any other principle. That the opinion of the Kandyan chiefs and the adjudications in pre-British contentions should have been conflicting can surprise no one who reflects upon the very arbitrary manner in which, there is every reason to believe, those adjudications were arrived at. I find for my own part every reason for adhering to the *per capita* rule once solemnly adopted by this Court.

Dias, J.—There are thirteen lands in dispute in this case, and it is admitted that one Horatalla was entitled to an undivided half of the first eight and the whole of the 11th, 12th and 13th lands mentioned in the libel, which were the acquired property of Horetalla. The plaintiff and the three defendants are children of Horatalla, and Horatalla being dead, the plaintiff claims half of Horetalla's lands. Horetalla was twice married, and by her first husband she had

six children, viz: the three defendants and three others who are no parties to this suit, and by her second marriage she had an only son, the plaintiff. The defendants contend that if plaintiff is entitled to anything at all he is only entitled to 1-7th of Horatalla's property, being one of her seven children. This would be a division *per capita*; but the plaintiff contends that the division should be *per stripes*, and, according to that division, the plaintiff, as representing one bed, would be entitled to one-half of Horatalla's property, the defendants taking the other half as representatives of the other bed. Plaintiff's contention is supported by Kandyan law. The District Judge has cited all the authorities bearing on the subject and I think his conclusion is right.

Another point which is not raised in the pleadings was taken in the court below and in this court, and that i , that the plaintiff, being the issue of an adulterous association between Horatalla and the plaintiff's father, he is not entitled to any part of Horatalla's property, or, in other words, that the plaintiff is in a worse position than an illegitimate child. I see no Kandyan law for this proposition, and the only authority cited at the Bar (*Perera's Armour p.* 34) seems more favourable to a party in the position of the plaintiff than the Dutch Law.

I would affirm the Judgment with costs.

Affirmed.—Sup: Court Cir. Vol: IX. *p.* 45.

Present:—PHEAR, C. J., STEWART, J., and DIAS, J.

(25th Februury, 1879.)

Kandy D. C. No. 70052.

Kandyan Law—Inheritance—Widow's interest—Maternal cousins.

Where a Kandyan died leaving no heirs on his father's side,

Held, that his widow succeeded to an absolute interest in all his property, *paraveni*, as well as acquired, in preference to his mother's sister's grand-children.

Rule of succession, given in *Armour* (*Perera's Ed.*) *pp.* 22 and 23, applied.

3—This was a suit in which the plaintiff sought to recover a two-thirds share of certain lands from Widows and widowers.

the defendant. It was admitted that the original owner of the lands in question, was Siatu arachchi, and that he died leaving a widow, Punchi Menika and no issue him surviving. It was alleged by plaintiffs, that the widow, on the death of her husband Siatu, entered into, and continued in, possession of the land till her death in 1876, when the defendant got sole possession of it. The plaintiffs now claimed two-thirds of the lands as the children of Siatu's cousins, Ram Menika and Punchirala, (children of Siatu's mother's sister) conceding to the defendant her right to the remaining one-third as full sister of Ram Menika and Punchirala.

Defendant denied that Ram Menika and Punchirala were Siatu's cousins and claimed the lands in their entirety for herself, as the sister of Siatu. She alleged that since Siatu's death, she had always been in possession, holding the lands subject to the life interest of Siatu's widow.

The District Judge dismissed plaintiff's case.

On appeal, *VanLangenberg* appeared for appellant, and *Dharmaratne* for respondent.

Cur. adv. vult.

On the 18th February, the judgment of the Court was delivered by PHEAR, C. J., as follows:—

The ground of right upon which the plaintiffs claim the lands in suit is that they are the deceased last proprietor Siatu's maternal aunt's grand children, and that he died intestate leaving no nearer blood relations. The evidence in the record seems to be sufficient to establish this relationship very satisfactorily. There is also evidence from which it may be inferred that he left no relations on the father's side, unless the defendant's peculiar case were made out. But it is admitted by both parties that he left a widow, Punchi Menika, who in fact took the property at his death, and enjoyed exclusive possession of it for some fourteen or fifteen years. It seems to have been considered in the Court below that the widow's interest was only a life estate, operating, so far as concerns the present case, merely to postpone the date at which the intestate's heirs are to be looked for. But it appears to us this is not so. On the state of the family, as the plaintiffs imperfectly re-

present it, at Siatu's death, (and the burden of proof lies upon them), it appears to us that Punchi Menika, his widow, was his heir and took all his property absolutely.

In *Armour* p. 22 (*Perera's Edition*), it is said that, on a certain condition there mentioned, the widow of the deceased is entitled to his entire estate including his *paraveni* or ancestral lands to the exclusion of his father's maternal uncle's son, as well as of more distant relations. Now, in regard to degree, the plaintiffs, who are grand-children of Siatu's maternal aunt, are precisely at the same distance from Siatu, as is the father's cousin of *Armour* from his prepositus, i. e , four steps. But in the case of one of the plaintiffs, three of these steps, and, in the case of the other, two of them, are through females, while in the example given by *Armour*, only one of the four was through a female. It cannot, we think, be doubted that the plaintiffs come under *Armour*'s rule of exclusion, provided the condition is fulfilled, which is thus expressed by *Armour*, that "the said proprietor had received all assistance from his wife and her family until his death, and had been neglected and disregarded by the kinsmen who is to be excluded." In the present case, it is plain that Siatu's widow lived with him till his death, when she succeeded to the property in question, and enjoyed it for many years; and it does not appear that the parents of the plaintiffs, their grand-mother, had any thing to do with taking care of him. As the case stands, it seems to us that we ought to hold that Siatu's widow took an absolute interest in his entire estate as against the plaintiffs. As regards his acquired property, there can be no doubt that she did so, because according to *Armour* in p. 23 the widow would take this property absolutely to the exclusion of a paternal aunt's children, and the plaintiffs cannot rank themselves higher than maternal aunt's grand-children.

In this view, inasmuch as the plaintiffs do not pretend to be heirs of the widow, their suit fas and has been rightly dismissed.—*Sup. Court Cir. Vol*, II. *p* 44.

Present:—PHEAR, C. J., STEWART, J., and DIAS, J.

(*7th February*, 1879.)

Kandy, D. C. No. 75215.

Kandyan Law—Life interest to widow—Condition subsequent—alienation—Forfeiture for.

A Kandyan husband by deed gave land to his wife Dingiri Amma, for her sole and exclusive possession and enjoyment for all the days of her life, in any manner she pleased, subject to the proviso, that the donee should duly make over the same "to none other but to my begotten five children born of Dingiri Amma."

Held, that the widow had an alienable life interest in the land, and that the proviso referred to the succession thereto at the legitimate termination of her life interest.

Per PHEAR, C. J.—Regard being had to the unrestricted power which a Kandyan proprietor now enjoys of disposing of his property as he likes by will, the issue, whether or not the property dealt with by a deed of gift *inter vivos*, constitutes the entirety of the donor's property, or whether or not the deed contains a clause of disherison, seems to afford a very narrow and technical ground for defeating a donor's intention, and such as ought not to be upheld for that purpose unless most clearly made out.

Armour pp. 19 and 21. (*Perera's Ed.*) cited.

This was a suit of ejectment.

The plaintiff as mortgagee of certain land in the Kandyan district brought a suit to enforce the mortgage obligation, and having obtained judgment he in execution of his decree sold the land by public auction, and himself became the purchaser.

The plantiff's mortgagor was a Kandyan widow who had obtained the land by gift from her late husband shorty before his death. She and the children lived elsewhere, but she held possesssion of this land for several years, until some time before the execution sale, when one or more of the children got possession of it; and when the plaintiff after the execution sale endeavoured to take possession of the subject of his purchase he was opposed by all the children, and on this ground instituted the present suit against them.

The District Court was of opinion that the

mortgage made by the widow was under a proviso or condition in her deed of gift void against the children, and for that reason dismissed the plaintiff's suit.

On appeal the decree of the District Court was reversed.

The appeal was first heard by the Court, constituted of STEWART, J., and CLARENCE, J., on the 13th December, 1878, but before judgment could be delivered MR. JUSTICE CLARENCE had left the Court on furlough. It was afterwards heard by the full Court, constituted of PHEAR, C. J., STEWART, J., and DIAS, J., on the 7th February, and on the 14th February, the judgment of the Court was delivered by PHEAR, C. J., as follows:—

In this suit, which is brought to recover certain specified land from the defendants, it is conceded that the plaintiff on the 7th May, 1877, at a sale then held by the Fiscal, in execution of a decree which the present plaintiff had obtained, against one Dingiri Menika, purchased such interest in the land under dispute as Dingiri Menika was at that time in any way entitled to.

Dingiri Menika is the widow, and the defendants are the children by her, of one Seerala, who himself died some nine or ten years before suit. The defendants admit that the land in question was the property of their father, that he, shortly before he died, by an instrument of conveyance, which is in evidence, and is dated the 8th January, 1867, granted the same to his wife, Dingiri, and further that they are now in exclusive possession of the land.

It is not objected that the plaintiff has never obtained any sort of possession from his vendor, and that, consequently, he cannot sue in ejectment on his own right only. Nor is it contended by the defendants that the deed of January, 1867, was such in character that it could not, under Kandyan law, on the death of their father operate to deprive them of their right, as his heirs, to succeed to his property. They take up the position that the deed was effectual to give to Dingiri an interest in the land, and to continue it to her until 1874—several years after the grantor's death,—but that she then forfeited that interest by making the alienation by

way of mortgage to the plaintiff, which is the foundation of the plaintiff's title.

Manifestly this position is untenable; for the deed in its terms purports to pass a sole and exclusive right of possession and enjoyment of the property, which is the subject of it, to Dingiri for all the days of her life, in any manner she pleases; and to such a right of property as this, the law recognizes the right of alienation to be incident, unless it be expressly prohibited by the instrument of conveyance, and unless the grantee's interest be made to terminate on its occurrence. The deed, no doubt, goes on to say that the grantee shall " duly make over the same to none other but to my begotten five children born of Dingiri Amma;" but this plainly refers to the succession at the legitimate termination of Dingiri's life interest. To construe it otherwise would be to make it a condition subsequent, imposed upon the proprietary interest conveyed by the deed without any accompanying provision for its enforcement, and so a condition void of effect.

And even had it been objected that the deed amounted to a gift of the donor's property without any clause in it, disinheriting the donor's heirs, and so, in the absence of a clause of disherison, ceased to have operation against them beyond the donor's life, there is nothing on the face of the deed itself to shew that the property dealt with by it constituted all the property of the donor. And when we turn to the evidence in the case, we find that although Dingiri, who was herself adduced as a witness on behalf of the defendants, deposed to the land in question being jointly acquired by herself and her former husband during their marriage, and therefore proved it to be such as she would independently of her husband's grant have had a life interest in, had she not married a second time (*Armour p.* 18,) yet she refrains from saying that her husband had no other property than this. And no other witness speaks to this point at all.

There thus appears in no way, any reason why the deed of January, 1867, should not have the full force and effect, wich it purports to exert, and to be directed to.

It may, perhaps, be not out of place here to

remark, that had the deceased Seerala exhibited the like intent to give Dingiria life interest in this land by the means of a will, instead of by that of a deed of gift made shortly before his death; there could then have been no question raised as to whether the property dealt with constituted all Seerala's property or not. That is, had he used the apt means of a will instead of a deed *inter vivos*, he could certainly now-a-days have done what the deed professes to do, even if he possessed no other property than that which the instrument attempted to pass. Regarded, then, as a ground of defence, adverse to the donor's intention, the issue, whether or not the property in dispute constituted the entirety of Seerala's property, or whether or not the deed contains a clause of dishersion seems to be very narrow and technical; and therefore such as ought not to be upheld, unless most clearly made out.

And, indeed, in reference to the widow, the same remark would have been applicable even before the Ordinance of Frauds and Perjuries; because it would appear from a passage in the 25th section of *Armour* (p. 21, *Perera's Ed.*) that under Kandyan law alone the husband could bequeath the whole of his property to his wife for life, with a power at her death, to appoint the same among the children, and further in the same section (p. 19), that the only effect of the absence of a clause of disherison from a deed of absolute bequest of a part of the property to the wife would be to cut down the bequest to a gift for life.

It seems to us, therefore, that the plaintiff ought to succeed in this suit.

In our view, the decree appealed from ought to be set aside, and in lieu thereof, it ought to be decreed that the plaintiff do recover from the defendants possession of the land described in the libel, with costs of suit.—*Sup: Court Cir. Vol. II. p.* 52.

Present :—CAYLEY, C. J., and DIAS, J.

(*7th November*, 1879.)

Ratnapura, D. C. No. 1174.

Kandyan law—Inherited property—Maintenance—Right of widow to.

By Kandyan law a widow is not entitled to succeed to her husband's inherited property; and consequently can neither alienate nor encumber it.

She may, however, be entitled to maintenance from such property.

Certain lands were claimed from the defendants by the plaintiff on behalf of a minor. The first and third defendants admitted the minor's right to one-half of the lands claimed, but with respect to the other half they claimed possession under a mortgage from one Kiripina, alleged to be the widow of Dingeria who was the late owner of the half share in dispute. They also alleged to hold a portion of the lands in question under a lease from Dingeria. The second defendant disclaimed all right and title to the land.

It was admitted at the trial that Dingiria was the late owner of half the lands claimed by the minor, that his said half-share was his inherited property and not his acquired property, and also that he had died leaving no issue, and had made no disposition of his property by will or deed. No evidence was led by the defendants as to their lease from Dingiria. The District Court had held that Kiripina was Dingiria's widow, and that the first and third defendants, who held under a lease *(sic)* from her, had established their defence as to the half of the land, and gave judgment accordingly.

From this judgment the plaintiff on behalf of the minor appealed.

On appeal *Grenier* appeared for the plaintiff appellant and *Templer* for the first and third defendants respondents.

The judgment of the Supreme Court reversing the judgment of the court below was delivered on the 19th November, as follows, by

CAYLEY, C. J.—In this case the plaintiff claims certain lands as guardian of Kiri Banda, a minor, and prays for a declaration of title on behalf of the minor,

and to eject the defendants. The second defendant disclaims; the first and third defendants plead that they held an undivided half of the first land claimed in the libel on a lease from one Dingiria, and that Dingiria's wife, Kiripina, mortgaged to them an undivided half of all the lands claimed. These defendants admit the minor's right to an undivided half of all the lands claimed, so it is to be presumed that the alleged lease and mortgage dealt with the same undivided half, so far as relates to the first land claimed. It is also to be presumed that they allege a right to possess the half share mortgaged to them in lieu of interest, though their right to possess under the mortgage is not set forth.

It appears that the land originally belonged to one Dingiri, who left two children, Dingiria, a son, and Batti, a daughter. The minor, on whose behalf this action is brought, is the daughter of Batti. Dingiria having left no children, and as the property was inherited property, the minor under Kandyan law would become, upon the death of Dingiria (her mother Batti being then dead), heir to this one-half unless Dingiria had dealt with his share by will or deed. There is no evidence of any such dealing. Indeed, no attempt has been made to prove the alleged lease from Dingiria set up in the answer. The first and third defendants are accordingly left to substantiate their claim under their mortgage from Kiripina, the alleged widow of Dingiria. This mortgage has not been proved, nor has any right been shewn in Kiripina to mortgage Dingiria's share, even assuming her to be Dingiria's widow. The lands having been inherited and not acquired by Dingira, his widow would only be entitled to maintenance out of them, if necessary, and not to the lands themselves.

The judgment of the court below will accordingly be reversed, and judgment entered for the minor as against the first and third defendants for the lands claimed in the libel with costs of suit, without prejudice, however, to the right, if any, of Kiripina to maintenance thereout. The evidence as to mesne profits is so vague that no judgment will be entered for them. It is doubtful whether second defendant interrupted plaintiff's possession. Plaintiff herself,

the guardian, states that second defendant did not dispute the minor's right. He will be absolved from the instance with costs.—*Sup: Court Cir: Vol: II. No.* 48, *page* 191—192.

Present:—CAYLEY, C. J., and DIAS, J.

(*21st October*, 1879.)

Kandy, D. C. No. 78861.

Kandyan Law—Diga marriage—Binna marriage—Inheritance, law of,—after acquired property of diga wife—Heir at law.

The plaintiff claimed as heir to his wife A, certain landed property which had been acquired by her during coverture. B. and C., the sisters of A, who admittedly are her heirs at law, if the plaintiff's contention was not maintainable, had sold the property in question to the defendants.

It was admitted at the trial that A. had been married to the deceased in *diga* and not in *binna.*

Held, that a *diga* married husband was his wife's heir to the exclusion of her sisters, so far as relates to her acquired property, whether real or personal.

No. 15,430, D. C. Colombo (South) *Austin* p. 66 commented on and followed.

In this case the parties were agreed as to the facts, and asked for the decision of the court on the question of Kandyan Law as to whether a husband was entitled to succeed as heir to his *diga* married wife's real property acquired after marriage.

The District Court held that the plaintiff (the husband) was entitled to succeed as heir to the property in question, and gave judgment accordingly.

From this judgment the defendants, who had purchased the property in dispute from the sisters of the deceased wife, appealed. On appeal *Grenier* appeared for the defendants appellants; and *Van Langenberg* for the plaintiff respondent.

Cur. adv. vult.

On the 31st October, the Supreme Court affirmed the decision of the District Court. The following judgments were delivered.—

DIAS, J.—This case entirely turns upon a point of Kandyan law. The plaintiff was the owner of the land which is the subject of this suit. He was married in *diga*, and during his marriage a writ of

execution issued against him, and at the Fiscal's sale his *diga* wife became the purchaser. She died without issue and her two sisters, Wimalli Etana and Diugiri Etana, sold the land to the defendants by a deed of 27th December, 1877. The above facts were all admitted, and on the day of the trial the proctors for the parties asked the opinion of the court on the pleadings, and certain admissions of fact then made. The question which the District Judge had to determine was, whether the plaintiff is the heir at law to his wife's *acquired* property? This question the District Judge has decided in the affirmative, and from this decision the defendants appeal. The case was fully argued before us on both sides, and our attention was called to all the text writers and the previous decisions on the subject.

It was admitted at the bar that a *binna* husband had no interest at all in his wife's property, whether ancestral or acquired, and the learned counsel for the appellants founded an argument upon this state of the law and contended that in principle the rule which governed the *binna* husband should equally apply to a *diga* husband.

No doubt the possession of a *binna* and a *diga* wife with respect to her husband's property is the same, as neither has any right to inherit her husband's property, but we cannot lose sight of the distinction which exists between *binna* and *diga* marriages with regard to the duties and obligations of the husbands.

A *binna* marriage is a marriage by which the husband is bound to live with his wife in her own family house. This in fact is what distinguishes it from a *diga* marriage. The *binna* wife remains a member of her own family, she has the absolute control of her own property, and she maintains and supports her husband during the marriage.

The character of a *diga* marriage is quite different. On such a marriage, the wife ceases to be a member of her own family, and is bound to go to the husband's family-house, and live with him there. In fact she abandons her own family and becomes a member of her husband's family, and the husband is bound to support her so long as she is his wife. The severance is so effectual that the *diga* married

daughter not only leaves her parents' family, but forfeits her right of inheritance to her father's estate in favour of her brothers and *binna* married sisters.

From the foregoing it would appear that a *diga* married woman is under greater obligations to her husband than a *binna* married woman, and this may probably account for the distinction, if any distinction there be, between the rights of *binna* and *diga* husbands with regard to their wives' property. The oldest authority bearing upon the point is to be found in *Sawers' Digest*, p. p. 8. and 16, where *Sawers* lays down in general terms that the husband is heir to his wife's landed property.

He however draws no distinction between *diga* and *binna* husbands. *Armour* is more to the point. He says that the goods which the wife had acquired during her *diga* coverture will remain to the husband, and the wife's brother shall have no right to that property. The word "goods" which *Armour* makes use of may not include landed property, but in a subsequent decision which is reported in *Austin* p. p. 66 and 67, the Supreme Court seems to have assumed that landed property was included in the word used by *Armour* as that decision refers to both *Armour* and *Sawers*. This decision reported in *Austin*, which was a judgment delivered in 1844 by a late Chief Justice of this Court, Sir W. O. Carr, is the strongest authority in favour of the plaintiff's contention.

In that case it was held by the District Court that the husband had a preferrent right to his wife's property acquired during coverture as against the full sister of the deceased wife, and this judgment was affirmed by the Supreme Court. Sir Charles Marshall, who wrote in 1839, says, upon the authority of the chiefs of the Udarata, that the husband is not the heir to his wife's landed property, whether inherited or acquired. Here again the distinction between a *diga* and a *binna* husband is not drawn, which makes Sir Charles Marshall's authority of less value as being too unqualified and opposed to the authority in *Armour*, p. 30.

On a careful review of all the authorities upon the subject, I am of opinion that a *diga* husband is the heir, and is entitled to succeed to the *acquired*

property of his deceased wife. In this view of the case the judgment appealed from will be affirmed.

Cayley, C. J.—I am of the same opinion. The case appears to me to be governed by the decision reported in Austin, p. 66. That decision, it is true, is general, and does not draw any distinction between *diga* and *binna* wives, but the reference to *Armour* shews that the property of *diga* wives only was in contemplation of the court; for *Armour* lays down quite a different rule when treating of the devolution of property belonging to *binna* wives.

It seems quite clear from *Armour* that a *diga* husband inherits his wife's *acquired* "goods" if she dies without issue. What *Armour* meant by the word "goods" may be doubtful; but I am disposed to think that in this expression he intended to include all kinds of property. If not, it is difficult to understand why he has left altogether untouched the important question of the devolution of land in cases of this kind. In any case it is difficult to see why a different principle should be applied to the devolution of acquired lands from that which governs the devolution of other description of acquired property.—*Sup. Court Cir. Vol.* ii. *No.* 44. *p. p.* 176, 177.

Present:—Clarence, J.

(*October 21st and 28th,* 1886.)

Kegalla, No. 25,156.

Kandyan Law—Husband and wife—Intestacy—Widow—Moveable property—Suit by heir.

The widow, of a Kandyan who dies intestate, is entitled to the custody and administration of the moveable property left by the intestate; accordingly, the son and heir cannot sue to recover such property during the lifetime of the widow.

The plaintiff sued on a mortgage in favour of his father, deceased intestate, to recover the sum of Rs. 80 due under the mortgage. The plaintiff averred that he was the only son and heir of his father, and in possession of his estate. The defendants pleaded that the plaintiff's action was not maintainable, as the deceased mortgagee had left a widow, who was

still living. At the trial it was admitted that the widow was still living, and the Commissioner thereupon dismissed the plaintiff's action, with costs.

The plaintiff appealed.

Dornhorst, for plaintiff appellant.

Browne, for defendants respondents.

Cur. adv. vult.

On October 28th, 1886, the following judgment was delivered :—

CLARENCE, J.—This is an action on a mortgage. The mortgagee is dead, and plaintiff avers himself to be the only son and heir. Defendants, by their proctor, file a pleading, styled a demurrer, which is in fact no demurrer, but a plea. The defence is, that plaintiff is not the proper party to sue, (1) because he is not a legitimate son of the mortgagee; and (2) because the mortgagee left a widow, who is interested. It is admitted that the mortgagee did leave a widow, who is still living; and I think that the money due on a mortgage is "movable property" within the meaning of the Kandyan Law, in which the widow has at any rate a right of custody and administration. (*See Armour's Kandyan Law, Cap. 1, sec. 24.**) The Kandyan distinction seems to have been between land as immovable property and property of other kinds. *Affirmed. Sup. Court Cir. Vol. VIII. p. 26.*

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* *Perera's Edition.*

CHAPTER IV.

ON PRIESTS AND TEMPLES.

SECTION 1.

(Classification of Buddhist Priests and Temples.)

1. Vihara and Dewala.—2. Siamese, Amarapura, and Ramanna sects.—3. Orders into which Priests are divided.—4. Classes into which Priests are subdivided.

1. There are two kinds of temples in Ceylon, common to the Sinhalese:— Vihara and Dewala.

1. Vihara,
2. Dewala.

The former is a temple dedicated to Buddha alone, and the latter to one of the four Hindu deities: namely, Nata, Vishnu, Saman, and Pattini.

The officiating priest, who very often is also the incumbent, of a Buddhist temple called a *Vihara*, is called either a *Nayaka* or a *Barakara* unnanse.

The officiating priest of a Hindu temple called *Dewala*, invariably a layman, is called a *Kapurala* *

2. In Ceylon, strictly speaking, there are only two sects of Buddhist priests called,— Siamese, Amarapura and Ramanna sects.

1. The Siamese sect,
2. The Amarapura sect.†

Another sect called *Ramanna Nikaya*, has only been recently introduced into Ceylon.

The principal difference between the Siam and the Amarapura sects consists more in ritual and ceremonies than in points of doctrine. For instance—

1. In the method of preaching and reading Bana.

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* The incumbent of a *Dewala* is called a *Basnayaka*. —ED.

† The *Siamese* sect was introduced into Ceylon from *Siam*, in the year 1753 A. D., and the *Amarapura* sect, from *Burma*, in the year 1815 A. D.—ED.

2. In the ordaining of candidates, *i.e.* Siam conferring the rite of ordination to the high class called *goi-wanse*, commonly, but incorrectly, called "Wellala caste," and within the consecrated precincts of the Malwatta and Asgirya wihara, and the Amarapura, to all castes without distinction, and at all places set up for the purpose.

3. In that the latter denounces the practice of physic and astrology by priests.

4. In the recitation of a form of blessing on the receipt of alms, which the former does, but not the latter.

5. In the performance by the latter of a ceremony equivalent to confirmation after ordination, which the former does not.

6. In the performance of the ceremony called panpinkama.*

7. In the mode of wearing the robe, and shaving the head. The Siamese sect cover only one shoulder and shave the hair on the eye brows, whereas the Amarapura sect cover both the shoulders and have the eye-brows unshorn. †

Orders into which priests are divided.

3. Each of these, or these sects may again be divided into two orders:—

1. Upasampada (ordained).
2. Samanera (unordained).

The former is the full admission to the privileges of the Buddhist priesthood; whilst the status of the Samanera is only equal to that of a novice or deacon in the Anglican church. No one is eligible for admission as a Samanera who is under eight years of age, and who has not received the consent of his parents.

A priest cannot receive his upasampada or ordination under twenty years of age.

Classes into which priests are sub-divided.

4. The upasampada, or ordained priests, may also be sub-divided into several classes, according to the seniority of their ordination.

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* Feast of Lamps.—Ed.

† See *Hardy's Eastern Monachism* Ch. xxiii. p. 329. It is as well here to state that it is usual for even priests of the Siam sect, to cover both the shoulders when they go about collecting alms, called *pindapata.*—Ed.

(*a*) *Thera*—A priest who has been ordained ten years or more.

(*b*) *Majjhima*—One who has been a priest five years and under ten.

(*c*) *Navaka*—One who is less than five years a priest, and is bound to remain under the supervision of his spiritual teacher.

The Samanera priests admit of none of these classifications—being only novices who are studying for the upasampada order.

SECTION 2.

(*Succession to Temple property how regulated.*)

1. Sisyanu Sisya paramparawa.—2 Siwuru-paramparawa.

1. Sisyanu Sisya paramparawa
 (Pupillary succession.)
2. Siwuru-paramparawa
 (Hereditary succession.)

The former, strictly speaking, is the succession by a priest to temple property by right of his tutor, as the eldest and the most qualified pupil; whereas the latter is only by right of having been robed and intended for succession to the property by the living incumbent, and such are very often near relatives of the incumbent priest.

The following is the definition of the above terms by experts whose evidence was taken in the leading Kurunegala case No. 366:—

Sisyanu sisya paramparawa.

1. " *Sisya-paramparawa.*—The lands, Vihara, " &c, belonging to Bhikshu (or upasampada priests) " will, although he had (so many as) five pupils, devolve " solely on that pupil to whom an absolute gift was " made thereof, and that pupil alone of the said donor " will afterwards succeed thereto, who received a regu- " lar gift of the same from him.* The uninterrupted " succession of pupils in this manner is termed Sisya- " paramparawa.

" Should the priest, the original proprietor, de- " clare his bequest common to all his five pupils, they " will all become entitled thereto, and one of them

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* This practice is contrary to Buddhist Law.—ED.

" being elected to the superiority, the other four may " participate in the benefits ; the said superior being " dead, the next in rank will succeed to the superiori- " ty, and along with the rest (of the survivors) will " enjoy the benefits.

" This order having subsisted, the last survivor " will enjoy the benefit, and have the power to make a " gift in favour of any other person. But the origi- " nal proprietor-priest may transfer his rights to any " other person he may choose, passing by his own " pupils. In the event of the original proprietor " dying intestate, the priests who happened to be as- " sembled (at his death) became entitled in common. " Things which belonged equally to two priests devolve " wholly to the survivor.

Siwuru paramparawa.

2. " *Siwuru-paramparawa.*—The priest who was " the original proprietor, ordaining a relation to the " priesthood, and bestowing his property on him, and " the latter in like manner ordaining a relation, and " making a gift in his favour ; the ordaining of rela- " tions for the succession in this manner is termed " Siwuru-paramparawa. However, the practice has " also subsisted in this Island, of a priest who had " himself failed to appoint a relation to the succession, " authorising another to ordain a relation to the " priesthood, and to deliver up the property to him."*

Section 3.

(*From Marshall's Judgments.*)

1. Buddhist priest cannot possess property except in trust for a temple.—2. Distinction between *Sisya* and *Siwuru paramparawa.*

Buddhist priest cannot possess property, except in trust for a temple.

1. It seems to be one of the tenets of the Buddhist religion that a man, on becoming a Priest, resigns all worldly wealth, and no longer possesses the right or power of holding property, whether moveable or immoveable, except in trust for his temple, if he be in charge of one. *Vide supra* titles "Kandy," par. 77 and "Land" par. 14. This entire abnegation of earthly

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* See "Administration Reports" of *Ser. Ten. Com.* of 1871, page 380.—Ed.

possessions, however, seems not less difficult to be put in practice in Ceylon than elsewhere. And accordingly the Courts furnish numerous instances of Priests laying claims to property in their own right, or at least with a very slender colouring of any title, on the part of temples, to veil their own claims.

A priest brought an action for two paddy grounds, as having been dedicated to Ellewelle Vihare by Sellegodde Unnanse, before his death. The defendant denied that Sellegodde had any right to dispose of the fi-lds; alleging that they were his, the defendent's parveny property; that he had permitted Sellegodde to enjoy the profits of them in consideration of medical aid, and during the defendant's pleasure, but no further; that the defendant had always performed the Rajakariya for them, which would not have been the case, if he had transferred them absolutely to Sellegodde [as to which see titles "Kandy," paragraph 3, and 51 and "Land" par. 15] and, moreover, that the alleged dedication by Sellegodde would have been void, because prohibited by Proclamation of 8th September, 18 9. The plaintiff, by his replication, undertook to prove that the lands were the actual property of Sellegodde Unnanse, and had been transferred to him by the defendant's father and another person by deeds: he accounted for the defendant's performance of the Rajakariya by the ignorance of Sellegodde, in not getting the fields registered for exemption; and with respect to the Proclamation, he contended that the prohibition, as to dedication to temples, only referred to lands of laymen, and did not extend to those of Priests. It appeared from the evidence that Sellegodde Unnanse had received the produce of the fields for 35 or 40 years; but that they performed part of the defendant's *pangua*, and that the cultivation had taken place by permission of the defendant, who was considered the parveny owner. The Court of the Judicial Agent was of opinion that the possession of Sellegodde Unnanse had been fully proved, so as to give him a title by prescription; and consequently that he had a right to transfer the land to whomsoever he pleased. Judgment was given for the plaintiff, which was affirmed by the Court of the Judicial Commissioner. On appeal to the Governor, which devolved on the S. C.,

by operation of the new Charter, this decree was reversed on the following grounds :—Several objections present themselves to the validity of this decision. First, no proof whatever was offered of the execution of the Deed of Transfer from Sellegodde Unnanse to the plaintiff. This omission may, however, have proceeded on the supposition that the defendant, by his answer, did not intend to dispute the execution of that instrument, but only the right of Sellegodde to make such a transfer [see title "Pleadings," par. 14 to this point.] But the difficulty, which the Court feels in affirming the plaintiff's claim, proceeds upon much wider grounds. For, secondly, the possession of Sellegodde appears, from the evidence of nearly all the witnesses, to have been but a qualified one. The defendant continued to perform the Rajakariya, and his permission, it seems, was considered necessary for the cultivation of the land. This, therefore, was not such a possession as would have given Sellegodde Unnanse a prescriptive right, even if he had been a person who could have availed himself of such prescription; [see title "Prescription." par. 8] but thirdly, even if the defendant or his father had parted with the absolute possession of the land, the Unnanse would have been incapable, on account of his Priesthood, of possessing the land unless in trust for some temple. Now, it appears by one of the plaintiff's own witnesses that Sellegodde Unnanse had no Wihare. There was nothing, therefore, to prevent the defendant from resuming possession of this land even in the lifetime of Sellegodde Unnanse. Fourthly, still less had this Priest the slightest shadow of right to bequeath the land to any other person, whether Priest or Layman. The Court thinks it unnecessary to take any notice of the Proclamation of 1819, though that would have furnished another objection to the transfer from Sellegodde Unnanse to the plaintiff. The distinction which the plaintiff endeavours to draw between the lands of Laymen and those of Priests [supposing that Priests could have any such possession of lands, as would authorise them to make a legal transfer of them to others], is not to be found in the Proclamation. No. 5980, Ratnapura, 3rd February, 1834.

In the case mentioned under title "Administration" p. 5, a Priest, seeking to obtain administration

to the estate of his predecessor, *in forma pauperis*, endeavoured to get rid of the objection arising out of certain title deeds for land standing in his own name, by urging that the possession of any property, except in trust for a temple, was illegal; and therefore that the deeds should be considered as nullities. The S. C., however, was of opinion that the Priest could not be allowed thus to avail himself of the illegality of his own act, and to accept deeds one day in his own name, and to repudiate them the next as illegal, according to the convenience of the moment. But the Court also considered, with reference to the necessity for all administrators to give security for the due execution of their office, that nothing could be more at variance with the spirit of that highly salutary provision, than to allow to a person to administer an estate, who was avowedly a pauper, and for whom, therefore, especially if he could not legally possess property, no solvent person could reasonably be expected to give security. No. 2 Matura, 9th December, 1835,—*Mar. Judg. p.* 649 § 1. 2. 3.

Distinction between *Sisya* and *Sewurn paramparawa.*

2. Soon after the establishment of the present S. C., several cases came before it from the Kandyan Courts, especially from that of the Seven Korles, which had excited considerable interest, and in the investigation of which no pains had been spared, on the part of the Kandyan tribunals and authorities. Few of thes; cases, however, afford any materials for these notese having, for the most part, been decided on facts, rather than on questions of law, involving general principles. There is one case, however, to which it may be useful to refer upon the question of the right of succession to Wihares. Among the proceedings will be found a diligent and patient discussion of the difference between the *Sisya Paramparave*, or the descent of by pupils and the *Siwooroo Paramparawa*, or the ordaining and endowment by the original proprietor of one of his lay relations, who in his turn ordains another reiation and so on. This is the leading distinction between the *Sisya* and the *Siwooroo*; but the subject is treated at some length by the Priests and Chiefs who were consulted; the explanation given by the Priests of the *Malwatte* Wihare appearing to be considered by the Kandyan authorities more correct than that of the Asgiri Priests, No. 366, seven Korles,

Eriminne Unnanse Sinabowe and Parakumbere Unnanses, finally decided by the S. C. 21st October, 1833. See also the case of Wewegedere Unnanse vs. Kittigamme Unnanse, Seven Korles.—*Mar. Judg. p.* 649. § 4.

Section 4.

(*From Solomons' Manual.*)

1. Possession of landed property by priests.—of Lands belonging to temples.—3. Private property 2. priests.—4. Priests have the same rights as laymen,

Possession of landed property by priests.

1. According to the precepts of the Buddhist faith, a man by becoming a priest loses all right of inheritance to the property of his parents.* This rule, however, seems to have become a dead letter, for the right of priests to possess, inherit and succeed to property has been acknowledged by our Courts of Law. "The situation of priests in Ceylon", says Hardy, "is at present very different to that which was intended at the commencement of their order by Gotama Buddhu. Professedly medicants and possessing only a few articles that are of no intrinsic value, they are in reality the wealthiest and most honoured class in the nation to which they belong."†—*Sol Man. p.* 21.

Lands belonging to temples.

2. The temples in Ceylon are possessed of extensive tracts of land, most of them granted by ancient Kings and chiefs as offerings to Buddhu.‡ They are given out by the Incumbent for cultivation, on condition of receiving a share of the produce from the tenants. On the death of the Incumbent—if the temple is held in *Sisyanu-sisya-paramparawa* or pupillary succession—the property descends to his pupil, who thereupon assumes the entire control and

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* See *Perera's Armour p.* 51.—*Saw. Dig. p.* 7—*Morg. Dig. p.* 13.—*Ratnapura, No.* 5980 *Jud. Agt.*

† See *Mar. Judg. p.* 649.—*Hardy's Eastern Monachism p.* 69.

‡ See *Tennent Vol.* 1 *p.* 363, 374, 406.—*Lorenz* II *p.* 143.—*Mar. Judg. p.* 382.

management of it.* In the event of the priest having no pupil, it reverts to his tutor in preference to all others.† If the property belongs to two priests jointly and one dies, it goes to the survivor. Where several own it jointly, the same rule is observed, and in such a case if all die, the property becomes "*Sangika*," that is, devolves on the entire priesthood as a body. Until a priest resigns or is disrobed, he is considered to retain office and to be entitled to his share of paddy from the granary and to other dues, and the fact that he is refractory or disobedient to the principal of the Wihara is not a sufficient ground for withholding from him what he is entitled to.—*Sol. Man. p.* 22. ‡

Private property of priests.

3. In respect to private property, the authorities have prescribed different rules. By assuming the priestly office, as we have said before, a man loses all right of inheriting his parents' property, but if he afterwards resigned the office at the request of his parents or brothers, his rights would be revived.§ Should he throw off the robes at the request of his parents or brothers unanimously, he will be entitled to a share of the property, but not if he does so without any such request. If one brother without the other's consent induce him to give up the robe, then such brother must provide out of his share for the *Sewuralle* or ex-priest who can have no further right to the shares devolving on his brothers.‖ If a man specially transfer a land to his son in the priesthood, such son may accept that land; but the rest of the property will go to the other sons who are laymen. If the father was also a priest and received assistance from his son during his last illness and until death, then the landed property would be divided equally between the sacerdotal and lay sons. If a son who was once a priest returned to the lay state and was received again by his father into the family house, he will be reinstated in the position of an heir and will inherit equally with the other children. If a man enter the priesthood after his father's death, he

* See *Beling* 332 *Colombo D. C. No.* 2746.

† See *Austin's Rep. p.* 46.

‡ See *Austin's Rep. p.* 57.

§ See *Perera's Armour p.* 51.

‖ See *Perera's Armour p.* 51.—*Saw. Dig. p.* 7.—*Mar. Judg. p.* 337.

will not thereby forfeit the share of property he may have inherited from his father. Nor will the circumstances of his being in the priesthood affect his right of inheriting a share of his deceased brother's lands. If a man died intestate and without issue, leaving a brother, who is a priest, and a nephew, his lands will devolve on them in equal shares. When a priest is disrobed or resigns his office, he is entitled to maintenance from his parents' estate *—*Sol. Man. p.* 22

Priests have the same rights as laymen.

4. In a recent case, No. 2743, C. R. *Kegalle*, a plaintiff was non-suited on the ground that being a priest he could not possess property, the Commissioner no doubt proceeding on the old rule laid down in Sawers, that "to take the robe was to resign all worldly wealth." The Supreme Court, however, in appeal, set aside the order and sent the case back for hearing and judgment, remarking that in Ceylon Courts of Law, priests have the same rights as laymen.†—*Sol. Man. p.* 23.

SECTION 5.

(*From Austin's Appeal Reports.*)

1. Priests of one sect not entitled to succeed to temple property of another sect.—2. When there is no pupil, tutor succeeds.—3. Resident priest, though of a different sect, entitled to maintenance from the profits of that temple.

Priests of one sect, not entitled to succeed to temple property of another sect.

1. *Kandy D. C.*, No. 8950.—Rambukwella Unnanse, the Defendant, was the Chief-priest of the Huduhumpola Temple, but having adopted the Amerapoora persuasion, Government dismissed him, and appointed Wariapola Unnanse (the Intervenient) in his stead. Defendant however having refused to give up possession of the said Temple, the Crown brought this action to eject him; but before trial he having died, the resident priests of the Temple (some of whom also professed the Amarapoora faith) were made Defendants on the record. These latter con-

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* See *Perera's Armour* pp. 51, 52.—*Saw. Dig. p.* 7.—*Mar. Judg. p.* 337.

† See Appendix to *Saw. Dig. p.* 45.—*Perera's Armour p.* 51.—*Mor. Dig. p.* 66. § 282; *p.* 136 § 458.—*Austin's Rep. pp.* 105, 124, 169.

tended that being pupils of the founder of the said Temple, one of their body should be appointed to the vacancy now caused by the death of Rambukwella in preference to Intervenient. The Court below decided in their favour. The following, however, is the Judgment of the Supreme Court. "The questions before the Court are simply, 1st. Has the Government a right to appoint a Priest of the Asgiri establishment of the Siam sect, who is not a pupil of the founder of the Huduhoompola Temple, to the vacancy caused by the death of Rambukwella, in the office of Chief-priest of that Temple; or must it select a pupil of the founder? 2nd. Is a pupil of the founder who has adopted the Amarapoora faith eligible under any circumstances to the office of Chief-priest of this temple?

"It now appears that since the establishment of Buddhism, there have existed two sects in that religion; that of Siam and that of Amarapoora,—and that though deputations from Amerapoora were occasionally received at Kandy in the time of its Kings, it did not exist as a recognized sect when that Kingdom passed into the hands of the British Government. No Vihares or Pansalas were occupied by Amerapoora Priests,—all the religious establishments belonged to the rival establishment of Siam. It appears also that in matters of ceremonial as in matters of faith, various points of difference exist between the two sects, and that though many of these points (perhaps all, except that which restricts the selection of Priests to persons of the Vellalla Caste, which is a rule of the Siam sect) may appear immaterial to persons of a totally different creed, they are essentially the votaries of either sect.

The manner in which certain prayers are pronounced, for instance, is considered as rendering them propitious or unpropitious to the diety, according to the respective opinions of the sect to which the parties belong. These things, therefore, however formal and however insignificant they may appear to strangers, are symbols of, and acknowledged tests of faith,—essential articles of doctrine. It appearing, therefore, that one sect, viz: the Siamese alone, has existed in Kandy, and that at the time of the foundation of this Temple the Sovereign was Siamese, the Chief of the

Asgiri establishment (of which this is avowedly a dependency in matters of faith) Siamese, and the founder of this particular Temple Siamese, the Court is of opinion that it would be acting *contra formam doni*, contrary to the undoubted intentions of the founder and of the persons who have endowed this Temple with lands, and contrary to the plain construction of the Treaty of 1815,* were it to allow this property to pass into the hands of persons who cannot but be deemed to profess an heretical faith by the Siamese Buddhists. It may be true that the Amarapoora is the more ancient and purer faith, but this is entirely foreign to the question at issue, which is not one of orthodoxy in Buddhism, but the tenure and property; and in this sense it is sufficient that the faith now professed by some of the respondents differs from that of the founders, and unrecognized at the period of the accession of the British Government, for them to be ineligible to foundations endowed by the followers of another creed. But the Court would not have it understood that by this decision it in any way infringes the acknowledged principles of religious toleration; there is nothing in its decree or in the reasons on which it is founded to prevent the Amarapoora sect from propagating their sentiments, from buying, from occupying Pansalas and Vihares within the Kandyan territories. The Court merely determines that they cannot usurp the property of others, and turn it to purposes evidently opposed to the religious wishes of the holders of such property.

"As regards the tenure of this Temple, there seems to exist no doubt that it should be considered *Sangika*, the temple having been built little more than sixty years, and there being no Sannas or Royal grant produced, or proved to have existed or been given for it, though the King granted lands; consequently the Crown is not limited to the selection of a pupil of the founder for the office of Chief Priest, but it may select any Buddhist Priest belonging to the Asgiri establishment and professing the doctrines of the Siam sect.

"On these grounds the decree of the District Court is set aside, and in lieu thereof it is now decreed

* Clause 5.

that the intervenient, Wariapola Unnanse, be put into possession of the Temple and garden of Huduhoompolla and its dependencies as Chief Priest thereof, and that he be allowed to exercise all the rights and powers, and to perform all the duties, and receive all the profits and emoluments attaching to his said office of Chief Priest, in as full and effectual a manner as his predecessors (Chief Priests of the said Temple) have hitherto done. Each party will bear its own costs" *Collective, December* 28, 1838. —*Austin's Rep. p.* 40.

When there is no pupil, tutor succeeds.

2. *South Court No.* 11170.—In this case the Court examined several priests as to the law of succession to an incumbency, in case a priest died without leaving a pupil. They were unanimously of opinion that the priest's tutor succeeded in preference to anybody else. The Court below, concurring in this opinion, gave judgment for plaintiff. April 29, 1814. Defendant appealed, but failing to give security, the question was not brought before the Supreme Court.—*Austin's Rep. p.* 45.

Resident priest, though of a different sect, entitled to maintenance from the profits of that temple.

3. *South Court*—No. 1409. Plaintiff as one of the resident Priests of the Huduhoompolla Temple, states that he is entitled by virtue of his office to a monthly allowance of four parrahs of paddy from the granary belonging to the said Temple. That since the appointment, however, two years ago, of the defendant as principal of the said temple, he the said defendant discontinued the allowance and still refuses to give plaintiff any share whatever. He therefore claims 104 parrahs or their value £5·4, being the last two years' allowance. Defendant denies plaintiff's right and states that the temple in question had always a body of ten resident priests who were of the *Siamese* sect of the Buddhist faith. That his predecessor (Rambookwella Unnanse) was dismissed from office because he was considered a heretic, having embraced the tenets of the *Amerapoora* sect. That subsequent to such dismissal the British Government was necessitated to institute legal proceedings against him to have him ejected from the said temple, in which suit the present plaintiff became a party after the death of the said Rambookwella,* on account of which he was not allowed to

* See No. 8950.

take any part in the religious services in the said temple, and has thereby forfeited his right to any share in its revenue. In addition to this, defendant states that plaintiff has incurred his (defendant's) displeasure by being a most obstinate, disobedient, and refractory priest, and refusing to honor and obey his superiors. The Court below gave judgment for plaintiff.—" The only act alleged against the plaintiff is that he took part in a certain suit brought by the Government against the late Rambookwella Unnanse, but the Court is of opinion that this is not sufficient to deprive plaintiff of the allowance to which it is admitted he would otherwise have been entitled." In appeal *affirmed.*—" As the plaintiff has not ceased to belong to the *Siamese* sect by himself adopting the ordination and tenets of the *Amerapoora* sect, and has not thrown off his robes or been stripped of them for any violation of the rules of his order, the Court must still consider him to be entitled as a resident priest of the said temple to the allowance of paddy claimed by him. It has been stated by one of the Assessors that the superior of a Wihare has a right to withhold the allowance of paddy out of its common granary or store from any inferior priest who is disobedient or refractory, until such priest submits himself to the authority of the superior. The Court would require further evidence on that point if it were necessary to decide in this case whether the superior of this temple (being held by a body of ten resident priests) had the sole control of the subordinate priests, officers and servants of the *Vihare*, and whether the management of its granary and common property vested in him alone and not jointly with the other resident priests of the fraternity. But in this case, there is no evidence of plaintiff's having been disobedient and refractory during the two years in question so as to subject him to thereby forfeit his allowance. The defendant has upon his examination admitted *I have no other reason for saying that plaintiff has departed from the tenets of the Siamese sect, than that he took part in the case of Rambookwella Unnanse. If the plaintiff had not taken part in that case, he would have been entitled to the allowance he claims.* The Court has therefore only to add, that if the plaintiff, by having taken part with Rambookwella

Unnanse (his late superior in office), in the former suit, has rendered himself liable to be deprived of his robes of the *Siamese* ordination, and of his rights as a resident priest of the said temple, then the defend ant should take the customary proper steps to have the plaintiff stripped of his robes, and afterwards institute a suit to eject him from his *pansela* or residence at the *Vihare,* if he refused to quit it; but the defendant cannot take the law into his own hands, and wholly deprive the plaintiff of his rights as a resident Priest to support from the common store of the *Vihare* for an indefinite period upon the pretext that the plaintiff had ceased to belong to the *Siamese* sect by having supported his former superior in the suit aforesaid."—*Per Carr. October* 9, 1844.

The Assessors having dissented from his decision, they presented in writing the following reasons for so doing, to wit :—1st, Because the plaintiff had been excommunicated by Government when the said temple was entrusted to defendant, and, 2nd, Because whatever was offered to the priests in common could not be individually possessed, Upon this the following endorsement appears, "The Assessors have based their opinion upon some information out of court, as it is not proved in the case that plaintiff had been excommunicated from the temple, or that Government ever exercised such a right. On the contrary, a suit was instituted to eject Rambookwella Unnanse, and the judgment in that case does not affect the plaintiff who it appears has continued to be resident at the temple. There is neither principle nor authority under Kandyan customs, nor yet any other law, to support the position that one tenant in common could be wholly excluded by another from his share of the common estate, without having any legal remedy for it."—*Per Carr. October* 29, 1844.—*Austin's Rep. p.* 57.

SECTION 6.

(From Grenier's Appeal Reports.)

1. Buddhist priesthood and bequest by incumbent to co-pupil.

Buddhist priesthood and bequest by incumbent to co-pupil.

1. *Kurunegala, D. C. No.* 19,4 3.—Kotagama Unanse, chief priest of the Rukmale Vihare, robed his grand-nephew Kehelwatugode Unanse, when a child of 10 years old, and executed in the year of Saka 739 (A. D. 1817) in his favour a deed of gift of all the temple and other lands belonging to himself "by right of robing succession." On the 11th March, 184 , Kotagama on his death-bed executed a deed whereby "in making disposal of my property" he, *inter alia*, granted "to my pupil Kehelwatugode" a field, a temple and all his property at Ambaekke; to Inde, Welugodde, "a priest of the descendants of my tutor," other lands; to "my pupil Kotegaloluway" other lands; to "Karewilagala, the pupil of my tutor, who is rendering much assistance to me at present, the Rukmale Vihare village situate at Kotangampale Korle in the District of Seven Korles, and all the moveable and immoveable property thereto appertaining"; to Paepole and Pitiyagedere "who as my own pupils are rendering much assistance to me" certain lands in Kandy; and "moreover appointed that the remainder of all my moveable property * * * shall be equally divided among the aforenamed six priests." Kotagama died on the 3th March, 184 , and his Will was on the 1 th July, 1845, propounded in case 18,4 , District Court, Kandy, by all the legatees, except Kehelwatugode who opposed it as a forgery; but its validity was established by a decree of the 12th June, 18 6. From that decree Kehelwatugode appealed. In November 1 53, the Supreme Court remitted the case to the District Court to have the representative of one legatee, then dead, made a party, and this having been done by the District Court, order was then made on the 2nd February 1855 that the case should be returned to the Supreme Court. The case was apparently mislaid for some years, as it had not reached the Supreme Court on the 3rd March 1859. In September 1864, the Will itself was pro-

duced in evidence in a case 30879, D. C. Kandy, but the case 18,401, in which it had been filed, was not received by the Supreme Court till the 30th July 1872, and on the 4th September following the appeal was rejected, "it having been decided long ago that the appeal had been abandoned."

In the interval between 1846 and 1862, several law suits arose between Kotagama's legatees. In the first case (30879, D. C. Kandy, 1861-1864) the bequest in favour of Paepole and Pitiyagedere was upheld as against the claim of Kehelwatugode as pupil and heir, it being proved that the lands bequeathed were Kotagama's private property and not temple lands. In December 1870, the successor of Karewilagala brought an action (18,887 D. C. Kurunegala) against Kehelwatugode who, he alleged, had expelled him from the possession of the Rukmale Vihare, but this case was withdrawn without prejudice, pending the decision of 18401, D. C. Kandy, then received by the Supreme Court. Finally in 1873, after the Will had been upheld in appeal, Karewilagala's successor brought the present case against Kehelwatugode and his sub-priest Maldeniya for this Vihare. For the plaintiff, it was alleged in the pleadings and evidence that, after the death of Kotagama, Karewilagala as legatee thereof entered into possession of this Vihare in 1846 and continued therein till 1852 when he died. He was succeeded by plaintiff, who in 1853 put in charge a priest Nungomue, and the latter continued in charge till October 1868 when he was ejected. The 1st defendant, in denial of the plaintiff's possession, asserted that he himself had possessed since the institution of the case 18401, D. C. Kandy, in 1855, till the present time, and adduced evidence to prove that he had in charge under him at different times Mudunne (dead), Sumbulgodde (dead), Rekowa, Ratempola (1862-1867), 2nd defendant, Kadyonuwa, and Dambadenia, and claimed to hold the incumbency of the Vihare, &c., belonging to the late Kotagama by *Gnati-Sisya-paramparawa* as his pupil and relative, and by virtue of the deed of 1817. To the replication of the plaintiff claiming title under Kotagama's will, defendants rejoined that Kotagama had no right to execute such a Last Will and deviate thereby the succession to trust property, such as the Vihare and its endowments.

In addition to the conflicting evidence on either side, the cases 18,401 (Kotagama's will) and 308 9 (Paepollé and Pitiyagedera's legacy) D. C. Kandy, and 18,887, D. C. Kurunegala (previous suit withdrawn) were put in evidence by the plaintiff, and cases 18,218 and 18,569 D. C. Kurunegala, by the defendants. Of the latter, 18,218 was a possessory action brought by 1st defendant in 18·6 against Ratempola as his defaulting manager of this Vihare under a Power of Attorney which 1st defendant had cancelled, and 18,569 was a possessory action brought by Nungomue against 2nd defendant in 1870, in which the former was declared entitled to certain temple lands.

The District Judge (*F. H. De Saram*) after reviewing the history of Kotagama's will case, 18,401, D. C. Kandy, said :—"The questions arising for decision are, First—Is it competent for either party to claim the lands by prescription? Second—Can the defendant question the validity of the bequest to plaintiff, he having originally disputed the will only on the ground of its being a forgery? Third—Had the deceased Kotagama a right to dispose of the Temple to the plaintiff? First, possession will not benefit either party, as the case No. 18,401 must be regarded as pending till 1872, when the appeal was finally rejected, and this will prevent prescription running. Secondly, the will being upheld will not prevent the validity of the bequest being disputed, and the fact of the 1st defendant having consented to judgment being entered in No. 30879, D. C. Kandy, for certain lands in favour of purchasers from Paepole and Pitiyagedere, legatees under the will, does not debar him from disputing the bequest to the plaintiff's tutor, as the lands in dispute in that case were the private property of the testator. (Supreme Court judgment, 26th January, 1860, in that case). Thirdly, in determining the third question proposed for consideration, it is necessary to ascertain the mode of succession to this Temple, and it is important to look the wording of the will. Unfortunately, the original is not in the case, and it was stated by Counsel at the trial that it was abstracted from the record and is not forthcoming. There is, however, a translation filed, and from the endorsements on it, and from the record made in the case when it was filed, it is clear that it is the one that was

filed with the will. The plaintiff is the pupil of the late Karewilagala Unanse to whom the Rukmale Vihare was bequeathed, and it is through him that the plaintiff now lays claim to the Vihare. The plaintiff in his examination admitted that the testator succeeded his tutor in the management of this temple, so that it is clear the succession to the incumbency is regulated by the *Sisya-paramparawa*. The 1st defendant, however, contends that the succession is by the *Gnati-sisya-paramparawa*, that is that the pupil should also be a relation of the deceased priest, but this question does not arise in the case as between the plaintiff and 1st defendant. In this will (according to the translation) the testor designates Karewilagala Unanse as 'the pupil of my tutor' and calls the 1st defendant 'my pupil.' This declaration that Karewilagala Unanse was the tutor's fellow-pupil is conclusive, and from the leading case on the right of succession to Vihares (366 D. C. Kurunegala) it is clear that Kotagama Unanse could not bequeath his trust and will away the temple and its endowments to his fellow pupil, to the exclusion of his pupil, the 1st defendant. It is therefore decreed that the plaintiff's claim be dismissed with costs, and that the 1st defendant as pupil of Kotagama Unanse be quieted in the possession of the Rukmale Vihare with all the endowments thereof." Against this decision the plaintiff appealed.

Browne, for appellant. First, the bequest by Kotagama must be upheld as a bequest of private property in the absence of evidence to the contrary. The bequest in favor of Karewilagala is made in the form in which private property would be bequeathed by a priest. It is in the same language as that which was used in the devise to Paepole and Pitiyagedere of lands which in 30,879, D. C. Kandy, were proved to be private lands ; and the devise thereof was upheld. There do not occur in the will the words "in charge" or "in trust" on which so much stress was laid in the judgment in appeal in 9,040, D. C. Ratnapura, as denoting that the lands were temple property. The devise being followed by long possession, the onus of proof that these were temple lands lay on the defendant, who alleged that Kotagama had no power to deal with them by his last will. The original title has always been established in evidence in like cases : 366

D. C. Kurunegala, 9,040, D. C. Ratnapura, 27058, D. C. Galle. But the learned District Judge assumed the lands to be Temple lands, and therefore, in the absence of evidence, his decision must be set aside. [CAYLEY, J.—Kotagama's succession to his tutor, and the appellant's succession to his tutor suffice to shew that the lands pass by succession and are therefore temple lands.] Assuming his tutor to have died intestate and without granting him a deed of gift the appellant would succeed. [CAYLEY, J.—No. His lay heir would become entitled.] The question on the pleadings is the right of the appellant's tutor and not the right of the appellant under him. Secondly, assuming the lands to be Temple lands, Kotagama had the right to bequeath them to his fellow pupil. The 1st defendant has failed to support his contention that the succession is regulated by *Gnati-sisya-paramparawa* or *Siwuru-paramparawa* (as the succession by relationship is turned in 366, D. C. Kurunegala. Service Tenures Commission Report for 1871.) The law as to *Sisya-paramparawa* is thus laid down by the priests of Malwatte Wihare, as approved by twelve Kandyan chiefs on the 5th January, 1832. "The lands, Wihare, &c. belonging to Bhikshu (or Upasampada, priest) will, although he had (so many as) five pupils, devolve solely to that pupil to whom an absolute gift was made thereof, and that pupil alone of the said donee will afterwards succeed thereto who received a regular gift of the same from him. The uninterrupted succession of pupils in this manner is termed *Sisya paramparawa.* Should the priest, the original proprietor, declare his bequest common to all his five pupils, they will all become entitled thereto, and one of them being elected to the superiority, the other four may participate in the benefits; the said superior being dead, the next in rank will succeed to the superiority, and along with the rest (of the survivors) will enjoy the benefits. This order having subsisted, the last survivor will enjoy the benefit, and have the power to make a gift in favour of any other person. But the original proprietor priest may transfer his rights to any other person he may choose, passing by his own pupils. In the event of the original proprietor dying intestate, the priests who happened to be assembled at his death become

entitled in common. Things which belonged equally to two-priests devolve wholly to the survivor. "In these three rules, the rule as to succession to temple lands is laid down in a three-fold division, viz. (1) where gift is made to one pupil, (2) where the bequest is common to all pupils, and (3) where the rights are transferred to a stranger to the exclusion of all the pupils. Inasmuch however as the gift can be made to all the pupils or to a stranger, it follows that a priest while he has authority to do so (9040, D. C. Ratnapura) is not bound to select one pupil or indeed any pupil as his successor. It is sufficient if the object of his selection be a priest. In 51118, D. C. Kandy, it was held (per CAYLEY, D. J.) that a priest who has no pupils of his own can nominate as his successor a pupil of his fellow-pupil, as being one in the same line of pupillary succession; and referring to these laws of the Malwatte priests, it was there stated by the District Judge,—"the words are general, and I do not see how they can be made to apply to the incumbent's own pupils only." Accordingly, I submit that it was competent for Kotagama to bequeath to his fellow pupil to the exclusion of his own pupil, the respondent [CAYLEY, J. It has always been the accepted rule of law in this Court that when once a gift was made by a Sannas or otherwise of lands for the purpose of future priestly succession by *Sisya paramparawa*, the original proprietor priest might indicate the person through whom the line of succession was to pass, but that thereafter the succession was always to continue therein strictly limited to the pupils of each successive incumbent.] No such conditions are stated in these rules to have been ever imposed by the Kings or other donors, and as "the original proprietor priest" had absolute powers of selecting his successor, to whom he transferred all his rights, each succeeding proprietor priest received the same rights as belonged to the original proprietor-priest without limitation, and could dispose of them at his pleasure to any other priest, especially if the latter were a copupil. [CAYLEY, J. The enforced limitation of succession to a priests own pupils has never been questioned previously to this, and as it has always been accepted and acted upon, our judgment must be given in accordance with it] Thirdly, the defendant having in 1845 failed to prove

the invalidity of the testator's will in 18401, cannot be permitted now to question the validity of the bequests therein contained. This point was raised and decided in the affirmative in 38790, District Court, Kandy, against the present defendant who took an appeal therefrom. The decision was not set aside in appeal although the case was heard and remitted for further hearing on affidavits of fresh merits. Fourthly, prescription is against the defendant and establishes the genuineness of our claim. The non-receipt of 18401, District Court, Kandy, by the Supreme Court in 1859—not till 1872—and the production of the Will in Kandy in 1864, prove that the defendant must be regarded as having abandoned his appeal shortly after 1855, the date of the last order in the case. Rekowa, one of his own witnesses, proves that the appellant's managing priest, Nungomue, refused to let him into possession in 1860, and when Ratempola was ejected in 18218, D. C. Kurunegala, (to which the appellant was not a party), the headman in 1867 reported to tho Fiscal that Nungomue had then been in possession for 18 or 19 years, and resisted the execution of the writ. [CAYLEY J. The evidence of prescriptive possession should be far stronger in a case of this kind, but it is doubtful whether prescription could give a title to such a case of a trust. The ruling we have made however as to the necessary pupillary succession is conclusive against the appellant.]

Ferdinands and *Grenier* for respondent were no called upon. Judgment *affirmed.—Grenier's Rep Vol. III. p. 66.*

SECTION 7.

(From Ramanathan's Appeal Reports.)

1. Priests of one sect not entitled to temple property dedicated to another sect.—2, If temple property be common (*Sangika*), the resident priest cannot be sent away without cause.—3. Lease of temple property good, so long as the lessor is alive as priest.—4. Private property of priests goes to his temporal successor.—5. Buddhist priest, if only child, succeeds to his father's estate.

Priests of one sect not entitled to temple property dedicated to another sect.

1. *Galle D. C.* No. 15092.—Action to restrain defendant from officiating in a certain temple. It appeared that one Dona Jebona gifted the land in

1816 "for the purpose of enjoying the produce thereof as Sangike common property) by all priests resorting there from the four cardinal points and under the superiority of Goddegamma Buddbe Rakkitte Teroonanse," who in 1833 built a temple thereon, and officiated therein till his death, he being of the Siamese sect. Both plaintiff and defendant were his pupils, but the latter, though ordained as of his master's sect, went over about two years before action was brought to the Amerapoora sect. Much evidence was taken as to the fact of pupilage of the parties and the court pronounced the following judgment:—

"I am of opinion that the plaintiff has no standing in the court, and that there is nothing whatever to justify this court in granting the prayer of the libel. It is unnecessary to enter into the question which has been raised as to whether a priest seceding from the Siam to the Amerapoora sect would thereby forfeit his right to the incumbency of a temple wherein religious rites were celebrated according to the Siam sect. This does not come legitimately before the court looks at the deed upon which plaintiff founds his right and finds no mention whatever made therein of any temple. It appears to be simply a gift of a certain garden in favor of priests from all quarters of the globe with a view to their enjoying the produce of the fruit bearing trees standing thereon.

According to the clear and manifest intention of the donor, such was to be the application of the produce and the priest appointed to take charge of the garden, I consider to have been so appointed simply in the light of a superintendent.

The prayer of the libel if granted would appear to be directly opposed to the spirit and intention of the donor. As far as I understand, that intention was to devote this garden for the refreshment of all priests who might choose to resort thereto, and to adjudge a control over the property in favor of one sect to the exclusion of another would be, as I conceive, to defeat the clear intention of the donor.

The building has been put up since that gift was made, and there is nothing before the court to justify it in decreeing that the plaintiff has acquired a prescriptive right thereto.

The plaintiff is accordingly non-suited, parties bearing their own costs"

The plaintiff appealed against the judgment.

W. Morgan for appellant, *R. Morgan* for respondent.

The Supreme Court delivered the following judgment,

Set aside with costs, and it is decreed that the plaintiff being of the Siam sect, and pupil of the late Goddegamma Buddha Rakkitte Teroonanse, is entitled to succeed to his right as superior of the temple and *pansala* in question with the lands belonging thereto,—and he is accordingly decreed to be quieted in the possession thereof and the defendant must pay the costs of this suit. The Supreme Court is of opinion that under the deed of donation filed, the priests of the *Siam* sect only were entitled to enjoy the premises, and that it would be "*contra formam doni*" for priests of *Amerapoora* sect to hold the same. Whatever right therefore the defendant might have had as a pupil of the late Goddegamma Buddha Rakkitte Teroonanse he forfeited it by seceding from the Siam to the Amerapoora sect, and the plaintiff succeeded thereto, as his pupil of the Siam sect.—*Ram Nath. Rep.* 1843'55 *pp.* 42, 43, 44.

If temple property be common (*Sangika*) the resident priest cannot be sent away without cause.

2.—*Tangalla, D. C. No.* 1154.—*Per Curiam*:— The decree of the District Court of Tangalle of the 3rd September 1849 is affirmed with costs. The District Court has twice given judgment against the plaintiff on the evidence adduced by the parties, and the collective court sees no sufficient cause to dissent from such decree.

The evidence of the 5th, 6th, and 7th witnesses called for the plaintiff on the further hearing appears to be entitled to much weight; and as the 7th witness is the High priest of the Amerapoora sect and the parties belong respectively to Molkerigalle and Wihelle, which are both of the Siam sect, his evidence may be referred to as disinterested and independent in the matter of dispute, and he deposes "I belong to the Amerapoora sect, and am Chief priest. There are two original sects in the district (Tangalle) viz; Amerapoora and Siam societies, this latter is divided into two sects viz, Wihelle and Molkerigalle, the priests of these sects have separate temples. A priest of the Wihelle sect may by consent occupy a

temple belonging to the Molkerigalle sect, but the former cannot be ousted, unless that he has been excommunicated for some crime or other, but he cannot be ousted for exercising any rights in it." He adds further "although the temple might originally have belonged to the priest of one sect different from the sect of the resident priest, the latter cannot be ousted, and the produce of the temple property cannot be withheld from him if the temple and property be Sangika," which the temple in question is proved to be; and the witness on these points is fully corroborated by the 5th and 6th witnesses who are priests of the Siam sect.

Admitting even therefore that Goddapittia Terunanse and his pupils Caderoepokene and the plaintiff had a right to the temple under the deeds 1800 and 1818, still the defendant was clearly with their consent inducted to the temple, and has for many years been the resident priest thereof and officiated therein, and he is moreover proved by the plaintiff's 1st witness (on the first hearing) and others to have repaired the temple and kept the temple property in order and enjoyed the produce. Whilst the proof of the plaintiff having during the same period exercised any act as owner of the temple property is not only very conflicting, but as appears from the testimony of his 7th witness such acts on the plaintiff's part would be contrary to the Buddhist tenets, as the witness says "the produce of one temple which is Sangika cannot be removed from that temple and consumed by a priest of another temple, it must be left to the resident priest for his support."—*Ram. Nath. Rep.* 1843 '55 *pp.* 158-159.

Lease of temple property good, so long as the lessor is alive as priest.

3. *Kandy, D. C.* No. 67167.—The Supreme Court affirmed the finding of the court below as follows:—

The only point pressed upon us upon this appeal is that plaintiff cannot maintain this action of ejectment by reason that the foundation of his own title is a twenty five years' lease, which it was said, was *ultra vires* and bad *ab initio.* But the lease is good as against the incumbent who granted it, and as against all the world, as long as his incumbency endures. In the case cited for appellant (D. C. Kandy No, 59767 Civil Minutes 2nd July 1875) the incum-

bency of the party who granted the lease had already determined.—*Ram: Nath: Rep.* 1877. *p.* 325.

Private property of priest, goes to his temporal successor.

4. *Kandy. D. C. No.* 67849.—The Supreme Court held as follows:—

The plaintiff sues as the pupil of a deceased priest on a bond and promissory note granted by the defendant in favour of the deceased priest. Two parties intervene in the case, one calling himself a pupil of the deceased priest, and the other his brother and heir-at-law, and there is no doubt if the bond and promissory note are not temple property, the brother would be the party entitled to them. The two documents on the face of them are a bond and a promissory note in favour of the deceased priest. There is nothing in them to shew that they were trust property, which would go to his sacerdotal heirs, and we think the D. J. right in holding that they were the private property of the deceased priest.—*Ram: Nath: Rep:* 1877. *p.* 182.

Buddhist priest, if only child, succeeds to his father's estate.

5. *Ratnapura, D. C. No.* 6436.—*Per Curiam,*—The decree of the District Court is set aside and the case remanded back to be proceeded with and judgment to be given *de novo.* The costs are to abide the result.

Although a priest, if he has lay brothers and sisters, can have no claim to his father's land, but by special gift or bequest, yet if he be the *only child,* the Supreme Court has held that he has a right to inherit his father's lands in preference to collateral heirs, The rule is not general that a priest cannot acquire or inherit land, and that to take the robe is to resign all worldly wealth, as has been stated, because a priest may at all times acquire land from any one by gift, bequest or purchase, and may inherit his brother's or sister's estate.—*Ram: Nath: Rep:* 1843'55 *p.* 51.

SECTION 8.

(*From the Supreme Court Circular.*)

1. Robing necessary to pupilary succession called *Sisyanu sisya paramparawa.*—2. Right of incumbent priest to appoint a successor by Deed, and to revoke such appointment.—3. When the descending line is exhausted, recourse to be had to the ascending.—4. Resident priest entitled to rents and profits of the temple.—5. Private property of a Priest passes to his temporal successor.

Sisyanu Sisya Paramparawa tenure—Pupilary succession to Buddhistic Incumbency—Sannas.

Robing necessary to pupilary succession called *Sisyanu sisya paramparawa.*

1. *Kandy D. C.* No. 81630.—By a Sannas dated Saka 1708 a Vihara and certain appurtenant endowments were limited to the grantee "and his pupils in their generations." By a deed dated the 7th May 1849, the then incumbent of this Vihara granted it and its endowments to four persons "and their pupilary descendants in their generations." This grant contained the following proviso:—And out of the said four heirs, none of them shall at his own accord and singly make over his share of the said Vihara, &c., excepting with the mutual consent and approbation of the four; or, after it has fallen upon a single one of them, such survivor with one going astray from the Sannas, shall make over the same in writing." The plaintiff was one of the grantees and survived all the others. He was not a pupil of the grantor, but a pupil of the grantor's preceptor. He claimed the Vihara, &c., as such survivor.

Held, per Curiam, that if the deed of 1874 purported to vest the Vihara, &c., in the plaintiff, who was not a pupil of the grantor, to the exclusion of a pupil of one of the grantor's pupils, it was repugnant to the Sannas and opposed to the *Sisyanu Sisiya Paramparawa* tenure, and consequently that it conferred no title on the plaintiff.

Held further, *per Curiam,* that instruction without robing or presentation for orders by the preceptor is insufficient to create pupilage for the purposes of succession under the above tenure.

Held, by DIAS, J. that robing by the preceptor is necessary to create such pupilage, and that mere presentation for ordination is not sufficient 19413,

D. C. Kurunegala, "Grenier's Rep." *D. C.* (1874) *p.* 68, approved and followed.

This was an appeal by the defendants from a judgment of the District Court declaring the plaintiff entitled to a Vihara and its endowments. The facts of the case sufficiently appear in the judgment of the Chief Justice.

On appeal, *Van Langenberg* (*Dornhorst* with him) for defendants, appellants.

Ferdinands, D. Q. A. (*Grenier* with him) for plaintiff, respondent.

Cur. Adv. Vult.

On the 12th July, 1881, the following judgments were delivered:—

Cayley, C. J.—This is an action for a declaration of title to and for the ejectment of the defendants from a certain temple called the Degaldomwa Vihara and its endowments, and for mesne profits. The 1st defendant is a layman, and the 2nd and 3rd are Buddhist priests. All three are alleged to be in wrongful possession of the temple and its endowments. The three defendants have filed a common answer, but the 1st defendant does not set up any right in himself. He appears to join with the 2nd and 3rd defendants in setting up their right. It has been more than once pointed out by this court that a Buddhist priest cannot be ejected from a Buddhist Vihara, except, of course, for some personal cause, irrespective of the rights of property; for a duly dedicated Vihara is "Sangika," the common property of the Priesthood. But the incumbency of a Vihara and the control and management of its endowments may undoubtedly be vested in one or more person or persons to the exclusion of all others, and suits are common enough in our courts, which are brought by Buddhist priests for the purpose of obtaining declarations of right to Buddhist incumbencies, and of being quieted in the possession and enjoyment thereof and of the endowments and privileges thereto belonging. The present action is an action in effect of this kind and may be so treated, though the prayer of the libel is not aptly worded.

The plaintiff's title to this incumbency is set out in his libel as follows:—"Parenatala Ratnapala Unanse, a former incumbent, on the 7th May, 1849, by a

certain deed granted the temple and its endowments to four persons; viz., P. Sumana, P. Ratnupala (the younger), the plaintiff, and S. Sumangala." By this grant, which is admitted in the answer, the temple and its endowments are limited to the grantees "and their pupilary descendants in their generations;" and the grant contains the following proviso:—"And out of the said four heirs none of them shall at his own accord and singly make over his share of the said Vihara and the gampangos, gardens, houses and plantations as he shall choose in writing, excepting with the mutual consent and approbation of the four; or, after it has fallen upon a single one of them, such survivor without going astray from the Sannas of the Vihara shall, it is appointed, make over the same in writing."

The libel proceeds to aver that S. Sumangala disrobed himself in 1857, and P. Sumana in 1851, and that the latter was again robed by the plaintiff and died in 1878 at the Delgadomwa Vihara; that P. Ratnapala (the younger) died in 1877, and that the plaintiff became the sole surviving pupil of P. Ratnapala, the grantor of the deed of 849, and thus entitled to the possession of the Vihara and its endowments.

The defendants in their answer admit that P. Ratnapala (the elder) was the incumbent of the Vihara and in possession of its endowments, and that he executed the deed in 1849; but they plead that this deed, so far as it vested the incumbency in the survivor of the grantees to the exclusion of the pupils of a deceased pupil, contravened the Sannas by which the Vihara was founded, and is therefore, so far, invalid. The defendants further admit that S. Sumangala disrobed himself in 1857, but they deny that S. Sumana ever disrobed himself or ever became the pupil of the plaintiff. The defendants further say that P. Ratnapala (the younger) was chief incumbent of the Vihara, and that it was competent for him by Buddhist ecclesiastical law to appoint his successor in the pupilary line, and that by his last will he gave the incumbency to his only pupil, the 3rd defendant, who is now by his guardian, the 2nd defendant, in possession of the Vihare and its endowments. The answer further avers that the right of P. Sumana

were conveyed by a deed to the 2nd defendant, and the 3rd defendant jointly, the 2nd defendant being a pupil of P. Ratnapala (the elder), and the 3rd defendant having become P. Sumana's pupil after the death of his original preceptor, P. Ratnapala (the younger).

The principal question in the case which is raised in these pleadings, and the one upon which the plaintiff's right to this Vihara must stand or fall, seems to be this :—is the deed of 1849, so far as it purports to vest the incumbency in the survivor of the four grantees, valid and effectual? If it is, it seems to follow that the plaintiff is entitled to this incumbency. If it is not, he has failed to make out his case. Is, then, this provision as to survivorship repugnant to the Sannas by which the Vihara was founded and dedicated? This Sannas was granted in 1708 Saka, or A. D. 1786, and by it the Vihara and its endowments were limited to the grantee "and his pupils in their generations." There seems to be nothing special about this Sannas. It employs the ordinary language by which the *Sisyanu Sisya Paramparawa* tenure is created. Now, there can be no doubt, in view of the authorities cited by the learned District Judge and of other cases which have come before this Court, that under such a tenure it is competent for the incumbent to select one or more of his pupils to be his successor or successors, and such being the case, there seems to be no reason in principle why he should not appoint the incumbency to devolve upon all his pupils jointly with an ultimate appointment of the last survivor as sole incumbent, after the decease or disrobing of the others : for such a limitation does not break the line of succession.

But the plaintiff in this case appears not to have been the pupil of P. Ratnapala (the elder) in the sense of having been robed by him. I have always understood that it is the robing which constitutes pupilage for the purposes of succession to a tutor's incumbencies, and not mere instruction. Such is certainly the generally accepted law, and no authorities have been cited to the contrary. Indeed, the plaintiff's own witness, the distinguished High Priest of Adam's Peak, expressly confirms this. He states that pupils who have been merely taught by an incumbent would not succeed under *Sisyanu Sisya Paramparawa ;* and he goes on to say that robing is enough to constitute

pupilage, but that there must be either robing or presentation for ordination to constitute pupilage.

I was not previously aware that presentation was sufficient without robing to constitute pupilage, and perhaps the learned High Priest's statement as to this was not intended to be taken without some qualification; but this point is not material in the present case, for plaintiff was neither robed nor presented by P. Ratnapala (the elder.)

He states in cross-examination that he was not only robed by one Mahala Unnanse, but has succeeded to one Mahala's incumbencies as his pupil; and Ratnapala (the elder) seems to have had nothing whatever to do with the plaintiff's ordination; for plaintiff was still a "Samanera" when Ratnapala disrobed himself; and he became a "Samanera" under Mahala.

It was urged in appeal that plaintiff and Ratnapala (the elder) were co-pupils, each having been a pupil of Mahala, and that the deed of 1849 did not confer any right upon a stranger, in the event, which happened, of plaintiff surviving the other grantees, plaintiff himself being within the original pupilary line. The second defendant admits that plaintiff and Ratnapala (the elder) were both pupils of Mahala. The question then arises whether an incumbent has power to limit the succession to the incumbency first to a co-pupil jointly with a pupil of his own and then, after the death of the pupil, over to the co-pupil, to the exclusion of the pupil's pupil. I am not aware of any precise decision in point. It was held by the District Judge of Kurunegala in case No. 19,413 that an incumbent could not by will confer a temple and its endowments upon a co-pupil to the exclusion of his own pupils, and this decision was affirmed by the Supreme Court, "Grenier" (1874) *p.* 68. This case would seem to show that, when an incumbent has pupils of his own, he cannot interrupt the regular claim of succession from pupil to pupil; though no doubt when in any case an incumbent has several pupils he may make a selection from among them. The decision of the District Judge in the Kurunegala case is based upon the wellknown case No. 366 of the Agent's Court, Kurunegala ("Vanderstraaten's Rep." App. D.); but this case does not strictly de-

cide the point. The Supreme Court, however, judging from the reported *obiter dicta* of the judges, would seem to hold that an incumbent cannot, if he has pupils of his own, break the line of succession by appointing a co-pupil.

"Paramparawa," according to the Asgiriya priests (No. 366, Agent's Court, Kurunegala, *ubi supra*), implies an uninterrupted succession like the links of a chain. It appears to me that it is for the plaintiff to make out that the succession from pupil to pupil can can be interrupted in the manner contended for, and this he has failed to do. I accordingly think that the plaintiff's right under the deed of 1849 has not been established. In an action of this kind, which is brought against priests who are in possession, and one of whom is in the regular line of successi n, the plaintiff must clearly establish his right, and this he seems to me to have failed in doing.

I think the decree of the District Court must be *set aside*, and the plaintiff's suit be dismissed with costs.

DIAS, J.—In this case I fully concur in the judgment which has just been delivered by my lord the Chief Justice; but as the point of law involved in the case is one of some importance, I shall state my reasons for the opinion which I have formed. The Vihara in question was founded by a Sinhalese King, and the Sannas on which it was founded is a document of the usual kind, and the tenure created thereby is the wellknown tenure *Sisyanu Sisya Paramparawa*, which means "pupilary succession," or "succession from pupil to pupil." The second word "*anu*" means "each by each," or "orderly," and the effect of that word seems to me to limit the succession to the descending line, to the exclusion of both the ascending and the collateral lines. Thus we see that, according to the strict grammatical meaning of the words *Sisyanu Sisya Paramparawa*, the line of succession is limited to pupils of the descending line.

There are some decisions of this Court, and the District Court, which are apparently opposed to this view of the question, but in the view of the meaning of the expression and of the decisions in support of that view, I am of opinion that the line of succession from pupil to pupil cannot be interrupted, as it no

doubt would be if a collateral succession is engrafted on it. It is admitted on all sides that Paranatala Ratnapala (the elder) was the last incumbent of the Vihara in question, and that he by a deed of 1849 granted it to four priests, including the plaintiff. In that deed P. Ratnapsla (the elder) in mentioning the four grantees by name calls Paranatala, (the younger) his "relation and pupil;" but with regard to the other three he simply calls them "priests." By this deed Paranatala (the elder) conveys the Vihara and its endowments to the four priests under the tenure of *Sisya Paramparawa* and appoints Sumangala as their head. So far the deed is not open to any objection and is in accordance with Buddhist ecclesiastical law and practice, provided the grantees are, in point of fact, the pupils of the grantor.

There is another provision in the deed by which Ratnapala (the elder) appoints the survivor of the four grantees the incumbent of the Vihara and its endowments. This provision is equally unobjectionable, as was pointed out by my lord. Confessedly the plaintiff is the survivor of the four grantees, and if he was a pupil of Ratnapala (the elder) he is clearly entitled to succeed in this case. It has been proved that plaintiff was neither robed nor presented for ordination by Ratnapala. The plaintiff seems to have been a co. or fellow-pupil of Ratnapala (the elder) under a common preceptor called Mahala, and the questions of law which have been submitted to us for decision are ;—First, whether under the circumstances the plaintiff can be considered a sacerdotal pupil of Ratnapala (the elder), and second, whether it was competent to Ratnapala (the elder) to introduce his own co-pupil into the line of succession.

After Mahala's death, and in all probability during his lifetime, the plaintiff seems to have received instruction from Ratnapala (the elder), and it was contended that, that was sufficient to constitute pupilage under the tenure of *Sisya Paramparawa.* From this contention I entirely dissent. It is a wellknown fact that during the Sinhalese Government whatever learning there was to be obtained was to be found in Buddhist Viharas, presided over by learned priests who kept schools in their several Viharas to educate the boys in the neighbourhood. This practice, I be-

lieve, still prevails, and the boys so educated were never intended for the priesthood, but were what may be called lay-pupils. Unlike sacerdotal pupils they attended those schools in their ordinary dress, but sacerdotal pupil or pupils intended to become priests wore a yellow robe and were usually known by the name "Ebittaya," as distinguished from "Golaya," which is the name by which lay-pupils were designated. Thus, it will be seen that, robing is the first step with regard to pupils intended for the priesthood, and a boy so robed is called a "Samanera" priest, or one who has attained the first step in the priesthood.

With regard to ordination, which makes the "Samanera" an "Upasampada" priest, the pupil may be presented either by his preceptor or by his agent, and in my opinion robing is the only essential requirement to constitute pupilage, and that presentation for ordination is not of itself sufficient for that purpose, though as a matter of evidence it will go far to establish that the pupil presented was the pupil of the presentor. This, however, is only a *prima facie* inference which may be rebutted by satisfactory evidence of the pupil having been robed by a person other than the person who presented him for ordination. This opinion seems somewhat opposed to the opinion of the High Priest of Adam's Peak, who was examined as a witness in this case, but in the consideration of the questions which have been submitted to us, my opinion on this point is of little or no importance, it having been established that the plaintiff was never robed by Ratnapala (the elder) or presented by him for ordination. The mere fact of the plaintiff having received instruction from him will not make the plaintiff a sacerdotal pupil of Ratnapala (the elder), and, as I have already remarked, the plaintiff as a co-pupil of Ratnapala is not in the line of succession by descent, but in the collateral line, which in my opinion is inconsistent with the line of succession contemplated by the tenure of "*Sisya Paramparawa.*"

With regard to the several cases referred to by the learned judge, such of them as go to support the view that a co-pupil of the last incumbent who left pupils of his own can be placed in the line of succession to the exclusion of the pupils of the last incum-

bent, are opposed to the succession which results from the tenure of "*Sisya Paramparawa*," and I am of opinion that the case referred to by my lord ("Grenier's Rep." 1874, *p.* 68) lays down the law on the subject more correctly and consistently with the practice which prevails amongst Buddhists. For these reasons I think the judgment appealed from must be *reversed.—Sup. Court Cir. Vol. IV. p.* 121.

Present:—CLARENCE and DIAS, J.J.,

(*26th October, and 27th November*, 1883.)

Kurunegala, D. C. No. 21,217.

Succession—Buddhistic incumbency—Sisyanu Sisya Paramparawa tenure—Right of incumbent to appoint a successor by deed and to revoke such appointment—the Pitakas, how far applicable.

Under the laws observed in this Island, relating to the incumbency of Buddhist temples, the incumbent of a Vihara, held under the *Sisyanu Sisya Paramparawa* tenure, is entitled to appoint his successor by deed; and such deed may by deed be revoked by the incumbent, and a fresh appointment by him made.

Observations by DIAS, J, as to how far the laws contained in the *Pitakas* are in force in this coloney.

Right of incumbent priest to appoint a successor by Deed, and to revoke such appointment

2. This was an appeal by the plaintiff from a judgment of the District Court dismissing his case with costs.

The facts of the case sufficiently appear in the judgment of DIAS, J.

On appeal *Ferdinands, D. Q. A.*, (*Wendt* with him) for plaintiff, appellant

Dornhorst, for defendant, respondent.

Cur. adv. vult.

On the 27th November the following judgments affirming the decision appealed from were delivered.

DIAS, J.—The following facts are admited or proved. All the lands described in the Libel, except

Medakumbura, are Sanghika property attached to Henapola Vihara, of which Kossowa Chandrijoti waa the incumbent who died in possession on or about 1881, that the plaintiff and defendant are his lawful pupils; that the Vihara is held under the well-known tenure of *Sisyanu Sisya Paramparawa*; that on the 17th of March, 1876 Chandrijoti executed a deed conveying the Vihara and its temporalities in favour of his two pupils—the plaintiff and the defendant. By another deed of 16th December 1879, Chandrijoti revoked the first mentioned deed, and by a deed of the 13th of August, 1880, gifted the lands and the Vihara, to the defendant to the exclusion of the plaintiff.

It is extremely doubtful on the evidence whether Chandrijoti ever perfected the deed of the 17th of March, 1876, by delivery, the deed itself is not in the possession of the plaintiff, and it is produced by the defendant. The evidence on the point of delivery is conflicting. It appears that on some occasion of a pinkama the deceased priest produced the deed, and charging both the donees with ingratitude consulted the assembled priests as to what he should do in the circumstances, but nothing seems to have been finally settled on this occasion. The learned priest having revoked the deed, I may presume that, the deed of 1876 was duly perfected.

On the libel the plaintiff relied in the usual succession under the tenure of *Sisya Paramparawa*, but when the defendant pleaded the deed of 1876, the plaintiff in his reflication shifted his position and put his case on the deed of 1876. The trial took place on the 29th of November, 1882, and the evidence called by the plaintiff was directed to the point whether or not the deceased Chandrijoti could, according to Buddhist law, revoke such a deed as that of 1876. These priests gave their opinion in favour of the plaintiff's contention, and in support of their opinion they quoted passages from the *Pitakas*. These *Pitakas*, three I believe in number, contain a large body of rules and regulations with reference to the conduct of the priesthood, to the succession to ecclesiastical property, and so forth; but the Buddhists of Ceylon have not adopted all these rules, and our Courts have only given effect to such rules as have

been adopted in this country. Now, one of the fundamental rules of Buddhist theology is that a priest is not entitled to hold property commonly called *Putgalika* in his individual right. A priest, according to Buddhist law, is supposed to be a pauper, and he is indebted for his daily subsistence to the charity of Buddhists. This rule is, to some extent, in force in this country, for we occasionally see Buddhist priests going round with their *pattre* or vessel to collect their daily food. This is the correct Buddhist usage; but in point of fact, the Buddhist priests of this country are landed proprietors; they buy and sell and enter into contracts in their own right, and these dealings are upheld by our courts. In the above view of the matter, the plaintiff's evidence of Chandrijotis' power of revocation becomes of little value, as none of the priests examined say that the practice of the Buddhists of this country is in conformity with the law as laid down by these witnesses. It is a mistake to suppose that all the Buddhist law which is to be found in the three *Pitakas* is in force in this country. They are of no more force than all the Muhammedan law which is to be found in the Koran. This being so, and the deceased Chandrijoti having by his deed of the 13th of August, 1880, given the preference to the defendant in the incumbency of the Vihara, that preference must be upheld as the District Judge has done. The right of an incumbent last in possession to select one or more of his pupils to succeed him in the incumbency has been repeatedly upheld by this Court.—See Vanderstraaten's Rep, p.p. 224—232; and 4. S. C. Rep, 121, 123. The judgment of the District Court must, therefore, be *affirmed* with costs.

Clarence, J.—I agree with my brother Dias that the judgment of the District Court is right. A priest, incumbent of a vihara, under the tenure *Sisyanu Sisya Paramparawa*, if he has more than one pupil, is at liberty to appoint one of his pupils to be his successor to the exclusion of the others. That power has been expressly recognized by this Court in more than one case.

See the Ratnapura case, Vanderstraaten 132, and see also 4. S. C. R. 121, Kossowa Unnanse had power to appoint one pupil as his successor to the exclusion

of the others, and to invest the pupil so selected with the right to enjoy the *Sanghika* property appertaining to him as incumbent of the vihara.

By the deed of 1876, Kossowa Unnanse, after reciting that he was now old and infirm, purported to assure the lands concerned in this action to plaintiff and defendant, *habendum* the deed expressly states "in *Sisyanu Sisya Paramparawa.*"

By the deed of 1879 he purported to revoke that deed, and by the deed of 1880 he purported to appoint the property to defendant, *habendum* in *Sisyauu Sisya Paramparawa*. Evidently in 1876 the incumbent intend that plaintiff and defendant should jointly succeed him in the incumbency but afterwards he changed his mind, and determined that defendant should be his sole successor. In my opinion a deed such as the one of 1876 was revokable. I look to what was, in my opinion, the characteristic intention of the instrument, It appears to me in the nature of a testamentary instrument or revokable appointment, rather than an irrevokable conveyance. *Affirmed* with costs.—*Sup. Court. Cir. Vot: V. p.* 235,

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Present:—CLARENCE and DIAS, J. J.
(*20th December*, 1881.)
Matara, D. C., No. 30,710.

Pansala—Sisyanu Sisya Paramparawa tenure—Buddhistic incumbency—Succession—Tutor—Dayakeyas—Samenera and Upasampeda Ordination.

By the *Sisyanu Sisya Paramparawa* tenure the succession devolves first to the pupils of the incumbent; but when the descending line has been exhausted, resort must be had to the ascending line, and the tutor of the last incumbent is the proper person to succeed.

In such a case the Dayakeyas have no right to appoint a successor to the last incumbent.

When the descending line is exhausted, recourse to be had to the ascending.

3. This was an appeal from a judgment of the District Court by which the right of succession to a Buddhist pansala was declared to be in the plaintiff.

The facts of the case sufficiently appear in the judgment of the Supreme Court.

There was no appearance for the appellants.

Grenier for plaintiff, respondent.

Cur. adv. vult.

The judgment of the Court was delivered on 10th February, by

DIAS, J.—This case involves a question of Buddhistical law of some practical importance. The plaintiff claims the incumbency and chief management of Talaramblea pansala, and avers in his libel that one Pangha Nanga Unanse was the chief incumbent of the pansala, that he died, leaving no pupils, and that the plaintiff, as his tutor, is entitled to succeed him. The defendants in their answer set up a right, which on the face of it is bad. They allege that they were put in possession of the pansala by certain Dayakeyas, which means the persons who originally dedicated the pansala.

It would be convenient to dispose of the defendants' alleged right before going into the plaintiff's title. When a pansala or other property is dedicated in Sanghika, the dedicators or grantors cease to have any right or control over it, and the right to the property so granted is regulated by a well known tenure called *Sisyanu Sisiya Paramparawa*,

The right which the defendants set up is therefore quite unfounded, and as regards the incumbency and the management of the pansala in question the defendants are mere trespassers, but the plaintiff's title having been questioned by the defendants who are in possession, the plaintiff was bound to prove it. The case was first tried on the 13th November, 1879, and the then District Judge gave plaintiff judgment. This judgment was, however, set aside by the Supreme Court on 31st August 1880, and the case was remitted to the District Court for further hearing on the two following points, viz. :—

First, can a Samanera priest be invested with the incumbency of a Vihara?

Second, if the deceased Pangha Nanda was the pupil of the plaintiff, has the plaintiff a right to succeed him in this incumbency?

The second trial took place on 29th August 1881, when evidence was called on both sides. With regard to the first question, there is a large quantity of evidence founded on Buddhistical writings, and though the learned men who were examined are not agreed as to the meaning of certain words and ex-

pressions in the books they all agree that according to practice and usage Samanara priests have held and are now holding incumbencies like the one in question. Independently of this practice, the very words *Sisiya Paramparawa* seems to support the usage deposed to by the witnesses the meaning of these words is "from pupil to pupil," and all that is necessary to constitute pupilage is the robing of the pupil, when he becomes Samanera, or attains the first step in the priest-hood (see vol: 4, S. C. Cir, p. 121.) there is nothing in the words, themselves to justify any limitation of the pupil's rights, or denying him the right of succession until he is an ordained or an Upasampada priest. The question, however, is not altogether new. There is a case reported in Vanderstraation's Rep. p. 224, in which the District Court of Ratnapura upheld the rights of Samanera priests, and I am not aware of any case, either in this court or in the District Court, in which that right has been questioned, and according to the evidence adduced in this caae the practice of investing Samanera priests seems to be quite general.

The second question, whether a tutor is in the right line of succession to his pupil in the absence of pupils of that pupil, was fully gone into at the second trial, and the weight of evidence is decidedly in favour of the plaintiff's contention.

Except the case referred to from Austin's Reports, in the last Judgment of this Court, I am not aware of any case in which the point has been expressly decided; but I always understood the rule to be that after exhausting the descending line you must resort to the ascending line, such as the tutor of the deceased incumbent, and, failing him, the fellow-pupils of the deceased incumbent. There is a case reported in Rama-Nathan's Rep: (1863—68) p. 280, in which the District Court of Colombo upheld the right of a fellow-pupil. That case was, however, set aside by the Supreme Court, but upon grounds which did not affect the rights of the then plaintiff as a fellow-pupil of the deceased incumbent.

The learned Judge having decided the two issues which were sent down for a second trial in favour of the plaintiff, gave him Judgment, which I think is right and must be *affirmed.—Sup: Court Cir: Vol. V. p. 8.*

Present:—DIAS and LAWRIE. J. J.

(22, *April, and* 15 *July*. 1884.)

Ratnapura, D. C. No. $\frac{1828.}{2600.}$

Buddhist Law—Vihare—Sanghika property—Action for accounting—Absentee—Rents and profits—Prescription.

Where the incumbent of a Buddhist vihare appointed by will two of his pupils as his joint successors to the vihare endowments, and, after his death, both pupils entered upon the incumbency and shared the rents and profits thereof as joint rents for the period of prescription, and thereafter one of the two joint incumbents absented himself from the temple, leaving it in the sole charge of the other:

Held, that the absentee incumbent had no right of action against the resident incumbent for refusing to permit him to share, during his continued absence from the pansala, in the rents and profits arising out of the vihare endowment.

Semble, only those priests who reside in the pansala and take an active part in the rites and ceremonies performed in the vihare are entitled to share in the produce of the vihare endowment.

Semble, further, that a claim for rents and profits that accrued more than three years before action brought is prescribed.

Resident priest entitled to rents and profits of the temple.

4. This was an appeal by the defendant from a Judgment of the District Court ordering him to account for the rents and profits arising out of the endowment of a vihare to which the first plaintiff and the defendant had been appointed by the will of the late incumbent as joint incumbent and co-owners of the vihare property. The District Judge was of opinion that the first plaintiff had established his joint title with the defendant to the incumbency of the vihare in question: and also that he had enjoyed possession of the same for the full prescriptive period after the late incumbent's death; and, accordingly, he gave the plaintiff's a decree compelling the defendant to give an account of the rents and profits of the vihare endowments, as bequeathed under the will of the late incumbent, from the year 1875 in respect of the claim of the first plaintiff, and from the year 1877 in respect of the claim of the second plaintiff who had

purchased a portion of the first plaintiffs' interest in the vihare in that year

On appeal *Ferdinands S. G,* (*Dornhorst* with him) for the defendant, appellant.

VanLangenberg (*Seneviratne* with him) for the plaintiff, respondent.

Cur: adv: vult:

15th July:—The Judgment of the Court, dismissing the plaintiff's action, was this day delivered by

LAWRIE, J.—The first plaintiff, averring rights to shares in certain land and moneys as the legatee and pupil of a deceased Buddhist priest, state that the defendant, and co-owner and co-pupil, undertook the management of the estate in August, 1864, and collected the rents and profits; that he regularly accounted to the plaintiff and paid him what was due to him up to January, 1875 (except Rs. 910 and the amounts received under four Judgments, which are estimated at Rs. 15,000). That from January, 1875, until October, 1877, the defendant refused to account or to pay to the plaintiff; that in October, 1877, the first plaintiff transferred some of his rights to the second plaintiff; and then both plaintiffs complain that from that date until the institution of this action (27th February, 1880) the defendant refused to account to or to pay them anything. The prayer of the libel is for an accounting and for a decree for the amount to be found due. There is no prayer for a declaration of title.

We are of opinion that the claim for money alleged to have been in the hands of the defendant in January, 1875, is prescribed under the 8th section of the ordinance No: 22 of 1871. We are further of opinion that the claim for rents and profits received by the defendant more than three years before the date of the action is also prescribed—that is, that the plaintiffs have no right to an accounting prior to 27th February, 1877.

The estate in which the plaintiffs claim an interest is the property of the Pelmadulla vihare, of which the original testator was chief incumbent.

It is not necesary, in my opinion, to determine some of the questions raised in argument as to the rights of a priest to make a last will dealing with

the vihare and endowments, nor as to his powers to select from among his pupils one who shall have larger powers of management and a greater share in the rents.

It seems clear from the proof and from the averments of the plaintiffs, that first plaintiff has not for some years lived in the Pelmadulla Pansala, and that the second plaintiff has never lived there. So long as the first plaintiff resided at Palmadulla he must be asumed to have received, enjoyed, and consumed his due share of the fruits, rents, and profits accruing from the vihare endowments. When he voluntarily left Pelmadulla vihare—(for there is here no case of dispossession of the incumbent by another)—it is my opinion that he ceased to have a right to share in and to enjoy the produce of the Pelmadulla vihare lands.

The incumbent (or incumbents, if there be more than one) of a vihare has a right to share in the fruits of the endowment only as long as he or they reside in the pansala, and take part in the daily offerings and the periodical reading of *Bana* and other good works required by the laws of Buddha. Absentee priests have no right to damand that the fruits be sent to them to other places. All the paddy or coffee or cocoanuts, or whatever the produce may be, should be brought by the cultivators or vihare tenants to pansala store or granary, and there kept as *sangika* property, and consumed by the resident incumbent and by those of the priesthood who temporarily resort to or reside in the pansala. If the produce be more than sufficient for the needs of the residents, it may be sold, and any money received for timber sold or other property alienated should be devoted to the repair and improvement of the vihare buildings, the purchase of books, or the better endowment of the place.

I hold it to be sound and settled law that the fruits and proceeds of vihare property may not lawfully be consumed or spent, except by those who are residing at, taking care of, and performing duties at, the vihare and pansala.

These plaintiffs seem to me to have no right to share in or to demand an accounting of rents as long as they voluntarily remained absent from the temple.

We are of opinion that the plaintiff has not proved that any of the lands mentioned in the schedules are private property, which should be dealt with differently from the vihare endowments.

We are of opinion that the plaintiffs have not established their right to the accounting for which they pray. The action should be dismissed with costs.—*Sup. Court. Cir. Vol. VI. p. 92.*

Present: CLARENCE, J.

(*1st and 29th June*, 1882.)

Kandy, C. R. No. 19,205.

Buddhist Priest—Devolution of Property.

Held, affirming the decision of the Court of Requests, that money saved by a Buddhist priest, the incumbent of a pansala, out of the proceeds of the pansala lands, and by him invested in a mortgage, passed on his death to his temporal representatives.

Private property of a priest passes to his temporal successor.

5. This was an action by a Buddhist priest upon a mortgage made in favour of plaintiff's predecessor in the incumbency of a pansala. Defendant in his answer objected that plaintiff had no right to the mortgage money. At the hearing plaintiff asserted that the deceased priest had acquired the money advanced on the mortgage by the sale of Coffee grown on the pansala land. The commissioner (A. M. Ashmore, Esqr.) dismissed the suit with costs, holding that the mortgage passed, not to the mortgagor's spiritual successor, but to his temporal representatives.

Plaintiff appealed.

No Counsel appeared on the appeal.

Cur. adv. vult.

CLARENCE, J.—This is an action by the spiritual successor of a deceased Buddhist priest on a mortgage made in favour of the deceased priest. Defendant has taken objection to the plaintiff's right to sue. The case differs from the case reported Rama-Nathan (1877), 182, in as much as the Commissioner's judgment proceeds on the assumption that the money which the deceased priest advanced on the mortgage was acquired by the sale of c ffee grown on the pansala land. I think the commissioner's decision is right. A temple incumbent

holds the temple lands subject to the duty of making provision out of the revenues for the maintenance of the temple. Anything which he saves out of revenues and dies possessed of passes, I think, to his legal representative—that is, the person who would be his legal representative were he a layman. In my opinion the current of modern decision points to that conclusion. See 32, D. C. Matara—Morg. Dig., 282—2,743, C. R. Kegalla—Solomons C. R. Apps, pt. I, p. 10. My brother Dias, whom I have consulted, is of the same opinion.

Appeal dismissed—Sup. Court. Cir, Vol. V. p. 61.

CHAPTER V.

ON RAJAKARIA.

SECTION 1.

(From the Service Tenure Commissioners' Reports.)

1. What is meant by Rajakaria.

What is meant by Rajakaria.

1. The term RAJAKARIA, (*Service Tenure*) literally means, "King's Service:" but it is generally applicable to services of all kinds.—whether to the State, Church, or Chiefs. *

SECTION 2.

(Different kinds of villages.)

1. Principal villages to which Rajakaria has to be performed.—2. Minor villages called pangu or shares.

Principal villages to which Rajakaria has to be performed.

1. The villages or *gam*, to which Rajakaria has to be performed, are chiefly of three kinds,—

(*a.*) *Gabadagam,* (Royal villages).

(*b.*) *Viharagam,* and *Dewalagam,*(temple villages); or in other words villages belonging to Buddhist monasteries "Vihara," and Hindu temples "Dewala."

(*c.*) *Nindagam,* (villages of chiefs or of extensive landed proprietors). These last either were the ancestral property of the chiefs "pravenigam", or were originally royal villages bestowed from time to time on favourites of the court upon *Sannases* or otherwise. —*Ser. Ten. Com. Rep for* 1870. *p.* 2. †

Minor villages called pangu or shares.

2. Besides these three, there are other smaller ones known as office pangu; such as, "Vidanagampangu", "Lekamgampangu", "Kankanamgampangu", "Gallatgampangu", "Mi umgampangu", "Kuruwegampangu", "Multengegampangu" and "Atapattugampangu".—*Ser. Ten. Com. Rep for* 1872. *Part.* iii. *p.* 443.

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* *See D'Oyly's Notes. p.* 2.—*Mar. Judg. p.* 299.—*Thom. Inst. Vol II. p.* 598.

† See *Mar. Judg. p.* 299 § 10.—*Thom. Inst. Vol. II. p.* 600.

In these pangu or shares the tenants are placed by the proprietor of the village.—*Ser. Ten. Com. Rep. for* 1872, *Part.* iii. *p.* 443.

Section 3.

(*Different kinds of farms or pangu.*)

1. Prevenipangu.—2. Maruwenapangu.

In all these kinds of villages or *gam*, there are two species of farms, allotments, or holdings, called a *pangua.*—

1. A praveni pangua and
2. A maruwena pangua.

1. A *prevenipangua* is an heriditary holding * or an allotment of land in a temple or ninda village held in perpetuity by one or more holders subject to the performance of certain services to the temple or ninda proprietor. † The only *praveni* tenants were those who were on the land prior to the grant of the village to the ninda lord, or to a vihare or dewale:— A praveni pangua.

Ser. Ten. Com. Rep. for 1872 *Part.* iii. *p.* 443.

2. A *maruwanapangua* as defined by the Ordinance No. 4 of 1870 is an allotment of land "held by one or more tenants-at-will." This definition is incorrect; because, a "maruwenapangua" is a holding given out to a tenant for one year; the year being the year of cultivation. It was not the custom to eject a tenant at any time during the course of the year. Generally these *pangu* were held on from year to year by the same tenants, and often from generation to generation by the same family; but the tenants never acquired any hereditary title, had no right to sell, lease or sub-let, and were at all times liable to be called upon to give up the *pangua* on what may be called the annual rent day of the estate.—*Ser. Ten. Com. Rep. for* 1872 *Part.* iii. *p.* 443. Maruwena pangua.

On this tenure were held most, if not all of the office pangu; such as "Vidana", "Lekam", "Kankanam", "Minum", &c., and generally all lands on

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* *Ser. Ten. com. for* 1870 *p.* 2.

† *Sol. Man. p.* 30.

which tenants were placed by the proprietor of the village.—*Ser. Ten. Com. Rep. for* 1872. *Part* III. *p.* 443.

SECTION 4.

(*Muttettu lands.*)

1. Ninda muttettu.—2. Andamuttettu.

In these estates, certain portions are known *Muttettu*, or *Bandara* lands. These are retained for the use of the palace, monastry, or manor-house.—*Ser. Ten. Com. Rep. for* 1870. *p.* 2.

Muttettu lands are either.—

1. Ninda muttettu or
2. Anda muttettu.

Ninda muttettua

1. *A ninda muttettua* is a field which is cultivated gratuitously for the benefit of the proprietor by the person in consideration of the lands he possesses.—*Sol. Man. p.* 29.

Anda muttettu.

2. An *anda muttettua* is a field which is cultivated by one, on the usual condition of giving half share of the crop to the owner. These fields, namely "muttettu", which either belong to the chiefs or other proprietors are given out to tenants for cultivation, and are not worked by the owners themselves. Though the season for working and reaping the produce of the lands given out in *anda* extends over several months, it is not necessary that there should be a Notarial instrument to cultivate a paddy field by an *andakaraya* or tenant at will for half-share to avail in law * as he is removeable at pleasure by the "gamkaraya" (land owner).—*Sol. Man. p.* 29.

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* See *No.* 31172. *C. R. Kandy*, per Commissioner Dickson, recognised by the Supreme Court in *No.* 31530 *C. R. Kandy*, as a "sound and able exposition of the law" on that subject.—See also *D'Oyly's Notes.* *p* 4.—*Mar. Judg.* p. 304.

SECTION 5.

(*Different kinds of Service.*)

1. Services of a gabadagama.—2. Gabadagam service abolished.—3. Compulsory labour abolished.—4. Services of a Vihara or Dewalagama in general.—5. Services of a Vihragama in particular.—6. Services of a Dewalagama in particular.—7. Services of a Nindagama in particular.

Services may be divided into,—

1. Gabadagam service,
2. Vihara or Dewalagam service,
3. Nindagam service.

Services of a Gabadagama.

1. Services of a *Gabadagama* originally consisted in procuring rice to the "gabadawa" or the royal store or treasury being the produce of the *muttettu* fields which the tenants had to cultivate gratuitously in consideration of the other lands in the village to which they are entitled to as their *praveni* property.*

Gabadagam service abolished.

2. This was, however, practically nullified by orders from the Secretary of State to the local Government to give up all claim to service from the tenants of the royal villages and to recover from them for the Crown only the same share of the produce of their lands as was recovered from those who held under the feudal tenure.—*Ser. Ten. Com. Rep. for* 1870. *p* 5.

Compulsory labour abolished.

3. The feudal services and dues were commued for a land-tax or ground-rent by Proclamation of 21st. November 1818. The tax was generally fixed at one-tenth of the produce of rice-producing fields; but in certain loyal districts it was reduce to one-fourteenth, while in disloyal districts it was fixed at one-fifth. But, though the feudal services were thus commuted in 1818, the Crown reserved to itself the right to call out labour for certain public purposes —on payment at certain rates fixed by the officers of Government, and not with the consent of the inhabitants—and for the making of the roads. It was not till 1832 that the claim to compulsory service was fully abandoned by the Crown.—*Ser. Ten. Com. Rep. for* 1870. *p.* 5.†

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* See *D'Oyly's Notes. p.* 3.—*Mar. Judg. p.* 298.—*Thom. Inst. Vol. II. p.* 600.

† *See Note on page* 5 *of Ser. Tem. Com. Rep.* for 1870.

Services of a Vihara or Dewalagama in general.

4. Services of a *Viharagama* and *Devalagama* are only distinct from that of a *nindagama* by the former being performed either to a Buddhist monastery or Hindu temple in the Island and the latter to a private proprietor. These services are of every imaginable kind—some simply honorary, some of the most menial and laborious description, the lightest being usually paid most highly, while the heaviest are generally rewarded by enough land to afford only a bare substance, and precisely the same services are often paid in the same village at different rates: for instance, for sixty days' service in the kitchen, one man will hold an acre of land, another two acres, and a third, only a few perches. In fact the services have become attached to the land in the course of many generations, according to the pleasure of many land lords, and to the varying necessities of many tenants. Large farms have been bestowed on younger branches of a house, on the condition of a mere nominal recognition of allegiance. A family of faithful servants has been liberally provided for by a grant of part of an estate in full belief in the continued faithful performance of the customary service. In times of famine or scarcity, starving supplicants have with difficulty obtained from a landlord a small plot of land barely sufficient to maintain life, and, in return for it, have agreed to perform heavy and laborious services. Again, the tenant having originally no right in the soil, some landlords have in times past arbitrarily divided the original allotments into two or, sometimes, four portions, requiring for each subdivision the whole service originally required for the entire allotment, thus raising the rents sometimes two-fold, sometimes four-fold.—*Ser. Ten. Com. Rep. for* 1870. *p.* 5.*

Services of a Viharagama in particular.

5. The tenants on estates belonging to the Buddhist monasteries (called *Vihara*) keep the building in repair, cultivate the reserved fields, prepare the daily offerings of rice, attend the priest on journeys, &c. A remarkable case of religious toleration, which has become known in the course of Service Tenures enquiry is perhaps deserving of mention.

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* *D'Oyly's Notes. p.* 16.—*Saw. Dig. p.* 24. 25.—*Mar. Judg p.* 299.—*Thom. Inst. Vol. II. p.* 600.—*Sol. Man. p.* 29.—*Austin. Rep. p.* 112.—*Case No.* 19736 *D. C. Kandy.*

The tenants in the village Rambukandana, belonging to the ancient monastery of *Ridi Vihare,* are all Mohammedans. The service which they render to that establishment is confiined to the payment of dues and the transport of dues, &c., and has no connection with the services of the Buddhist Vihara, and their own Lebbe or priest is supported by a farm set apart by the Buddhist landlords for that purpose. There are thus Mohammedan tenants performing without reluctance service to a Buddhist monastery, and that monastery freely supporting a priest for its Mohammedan tenants. The head of this monastery has, from its foundation, been a member of the Tibbotuwawè family. This is the most important of the numerous private livings in Ceylon. When one of these becomes vacant, before one of the family to which it belongs has been ordained, here, as in England, a temporary incumbent is put in, who generally serves as tutor to the young heir.—*Ser. Ten. Com. Rep. for* 1870 *p.* 9.

Services of a Dewalagama in particular.

6. On the *Dewala* lands, the service is most complicated and peculiar, the part which each tenant has to take in the annual processions being minutely defined ; and it is to this that the popularity of the Déwale service is owing. The processions afford the ordinary villages the only opportunities for a general gathering, and for taking part in a pageant and a show, and above all it is on these occasions that the social distinctions to which the Kandyans attach great importance are publicly recognised.*—*Ser. Ten. Com. Rep. for* 1870 *p.* 9.

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* The most celebrated of these processions is the *Perahera,* which takes place at Kandy in the month of *Esala* (July—August), commencing with the new moon in that month, and continuing till the full moon. It is a Hindu festival in honor of the four deities Natha, Vishnu, Kataragama (Kandaswami), and Pattini, who are held in reverence by Buddhists of Ceylon as deviyo who worshipped Gautama, and are seeking to attain Nirwana. In the reign of King Kirtissri (A. D. 1747—1780), a body of priests who came over from Siam, for the purposes restoring the Upasampada ordination, objected to the observance of this Hindu ceremony in a Buddhist country. To remove their scruples, the King ordered the Dalada relic of Buddha to be carried thenceforth in procession with the insignia of the four deities; nevertheless, the Perahera is not regarded as a Buddhist ceremony.—*Note to Ser. Ten. Com. Rep. of* 1870 *p.* 9.

Services of a Nindagama in particular.

7. On the estates of the chiefs and large land owners (*Nindagam*) the services, as already indicated, are of the greatest possible variety. Chiefs and Mudiyanselá perform various honorary services. Wellála tenants cultivate the home farm, accompany their lord on journeys, take their turn on duty at the manor-house. Duray tenants carry baggage and the lord's palanquin, while the Wahumpuray carry the palanquins of the ladies of the family, and also provide for the service of the kitchen; and though there is a complete absence of equality and system in the remuneration given for domestic services, all such services are provided for with the utmost care. A chief with several villages will draw his cook or his bath-boy for two or three months a year from one village, from another for four months, from a third for one month, &c., carefully arranging to have one on duty throughout the year. There are the potter to make tiles and supply earthenware; the smith to clean the brass vessels, and repair and make agricultural implements; the chunam-burner to supply lime; the dobi or washerman, the mat-weaver (Kinnaraya) and the outcast Rodiya, who buries the carcases of animals that die on the estate, and supplies ropes &c., made of hide and fibres. Others supply pack-bulloks for the transport of the produce of the fields, and for bringing supplies of salt and cured fish from the towns on the coast.—*Ser. Ten. Com. Rep. for* 1870 *p.* 8.*

SECTION 6.

(*From Marshall's Judgments.*)

1. **Rajakaria prescribed after ten years' non-performance.**

Rajakaria prescribed after 10 years' non-performance.

1. The question has more than once arisen, whether the prescription for land, founded on ten years' possession, be applicable to services claimed by owners of villages in the Kandyan Districts and reserved to them by the Proclamation of 12 April 1832. In an action by a *Ninda proprietor* for services which he claimed from the Defendant as his tenant, but

* See *D'Oyly's Notes, p.* 3, 15. 16.—*Saw. Dig. p.* 24—26.—*Mar. Judg. p.* 299.—*Thom. Inst. Vol. II .p.* 600.

which the latter denied his liability to perform, it appeared that the services now claimed had not been performed since 1819. The D. C., however, considered that the plaintiff had established his claim, and decreed in his favor accordingly. The S. C. on appeal, referred the proceedings back to the D. C., in order that the question might be considered how far the claim of the Plaintiff was barred by prescription, at least as regarded those services which it appeared had not been performed or, it might be presumed, exacted, since the institution of the grain tax in 1819. The Proclamation of 18 September 1819 [establishing the periods of prescription for the Kandyan Provinces] had been held by the S. C. to bar actions for the enforcement of services, or to recover possession of land for refusal to perform them, where it had appeared the party claiming them had allowed ten years to run, without demanding the performance of them. Indeed if this Proclamation did not apply to such cases a tenant might be called upon to perform service to the Ninda holder though a hundred years might have elapsed, without any such demand being made on the tenant or his ancestors. No. 7190, Ratnapura 31st December 1834. The writer is unable to give the result of the inquiry thus directed to be instituted, as regards this partcular case. But he refers the reader to No. 493, Kandy, 19th November 1833, and he believes that other cases may be found in which the S. C, decided that actions for these services fell within the term of prescription limited to actions for land.—*Mar: Judg: p.* 526. § 10.

SECTION 7.

(From Morgan's Digest.)

1. Nila-proprietor's right to cultivate the land on payment of the usual fee, or performance of the accustomed services.—2. Land-lord cannot eject a tenant in a summary way.—3. Tenant may be ejected on his failing to pay or perform Rajakaria.

1. The Nille-proprietor may assert his right to cultivate the land on payment of the usual fees and performance of the accustomed services; and the owner has no right to eject any such tenant but on clear proof of his not paying such fees or not per-

Nila-proprietor's right to cultivate the land on payment of the usual fee or performance of the accustomed services.

forming the usual services. And a Court of Equity will generally relieve against a forfeiture for nonperformance of a condition or covenant of a Lessee, where compensation can be made.

As to the custom of succeeding or incoming tenant being entitled to the crop of the land when he takes possession, and the argument therefrom that a party who had been ejected from the land previous to the expiration of his term, could have sustained no hardship thereby as he must have himself in like manner enjoyed the produce of the crop of the preceding tenant. Held that such custom obviously applies only to those cases where the last tenant has occupied the land for the full period of his term, viz, one year, according to the accustomed tenure. No. 794 *D. C. Ratnapoora*, (*C.*) *Morg: Didg: p.* 100 § 406.

Land-lord cannot eject a tenant in a summary way.

2. Where a party, a Disava, claimed the power "to turn out the Nille holders of his estate whenever he pleased," the Supreme Court refused to recognize such pretension; and as the tenure of the lands in question was an admitted fact, *held* that the lord of the soil was bound to respect the rights of his tenants, whatever they may be, as fully and completely as they are to respect his; and that even if the lands were his property in fee, the moment the tenant had entered with his consent, he could no longer eject him in the above summary manner.—No. 794, *D. C. Ratnapoora*, (*J.*)—*Morg: Dig*: *p.* 131 § 448.

Tenant may be ejected on his failing to pay, or perform Rajakaria.

3. *Judgment.* That the decree of the District Court of Colombo No. 6, of the 23rd day of May 1841, be reversed with costs, and that the Plaintiff be decreed to be entitled to the lands in dispute as being the sole proprietor of the Nindagama Kanuggalle, to which they belong; and that the Defendant accordingly be decreed to pay to the Plaintiff as tenant of the above Nindagama the sum of £ 6 for *otu*, and value of services due on account of the above lands. And it is further decreed that on the Defendant's failure to pay the said sum within three months from the date of this decree, that she be ejected from the said lands and the plaintiff be thereupon put in possession thereof.—[No. 2,633, *D. C. Colombo*]—*Morg: Dig: p*, 327 § 706.

SECTION 8.

(*From Austin's appeal Reports.*)

1. Crown has a right to resume possession of service parveni lands whenever it pleases.—2. Diva Nilame cannot in the first instance eject tenant for non-performance of service.—3. A preveni tenant of temple cannot be ejected at the first instance for non-performance of service.—4. Basnaika cannot eject a preveni tenant for non-performance of service.—5. Tenant at will cannot be ejected at the first instance for non-performance of service.—6. Tenant at will of a temple may be replaced by its Land-lord.—7. Tenant of a temple-land cannot maintain an action without joining the incumbent priest.—8. Burden of proof, when there is a difference of opinion as to the nature of the tenancy.—9. Rajakaria prescribed, after ten years, adverse possession.

Crown has a right to resume possession of service parveni lands whenever it pleases.

1. *Kandy D. C. No.* 8,065.—The Court below was of opinion that the land in question having been held by Plaintiff as a Nillapangua of the Royal village, he can have no right to it against the Crown, by whom it was disposed of to defendant, government having the power of resuming possession of such service lands whenever it pleases, on dispensing with the service for which it was held. *Affirmed* in appeal, *March* 2, 1837.—*Austin's Rep: p.* 35.

Diewa Nilame cannot in the first instance eject a tenant for non-performance of service.

2. *Kandy D. C. No.* 19,736.—The following is the judgment of the Court below. " In this case, plaintiff as the present Diewa Nilame of the Maligawa, seeks to eject defendant from certain lands held by him at the village Angoda, alleging that the defendant holds these lands as a tenant of the Maligawa, and that the services which he was bound to render in respect of such lands he has failed to perform. Plaintiff also claims £ 4-10 as damages. Defendant admits that he is bound to render *some* of the services mentioned in the Libel, and that he *did* always perform them. One description of service however (felling of timber for the repairs of the Maligawa), he alleges he is *not* bound to perform. The Court however believes the evidence of plaintiff and his witnesses. It is apparent that defendant by his neglecting to perform these services, has rendered himself liable to be ejected from the lands, and has also caused damage to plaintiff to the extent claimed. It is therefore decreed that defendant do pay, such damages, and that in the event of his again failing to

perform all or any of the services enumerated in the Libel, he shall be ejected therefrom." In appeal affirmed, "except so far as to future forfeiture."—*Collective. July*, 4 1857.—*Austin's Rep. p.* 112.

A preveni tenant of a temple cannot be ejected at the first instance for non-performance of service.

3. *South Court.*—No. 14,560.—This was an action by the Incumbents of a Temple to eject defendant, who they stated was only an *Andakarea*, or one who cultivated in consideration of receiving a certain share of the produce. The Court however found that he was a *Paraveny Nillakaraya* or tenant in perpetuity, and as such entitled to hold the lands subject to certain services which were admitted by him. Claim dismissed. In appeal the following was added,—"the defendant to be liable also on any second instance of refusal to perform the above services, to be ejected from the said lands."—*Per Carr. October*, 4 1844.—*Austin's Rep. p.* 60.

Basnaika cannot eject a preveni tenant for non-performance of service.

4. *South Court.*—No. 14,242—Plaintiff sued a "*Basnaika Nilame* (Chief of a Dewala) to recover possession of a certain *paraveny* land, for which service was due to the Temple, and from which he had been forcibly ejected by defendant. The latter in his Answer stated that this land was not a *paraveny* land as alleged by plaintiff, but was a Bulatsurulla Pangua (land held by paying a certain fee to the Head of the Temple,) and that it could be taken from the possession of the tenant at any time the Basnaika chose. Plaintiff denied this, but defendant established his statement by evidence. The Court however was of opinion that the Basnaika could not displace or eject a possessor or cultivator of land subject to Temple-Service, unless there be a failure in the performance of such service. Judgment for plaintiff, and in appeal affirmed. *Per Oliphant. January*, 30 1844.—*Austin's Rep. p.* 59.

Tenant at will cannot be ejected at the first instance for non-performance of service.

5. *Kandy D. C.* No. 29,474.—Plaintiff as incumbent of a certain temple, sued to eject defendants from certain lands belonging to the said temple, and for damages for services which they as tenants failed to render. Defendants admitted that they were subject to perform service to the temple, that they *did* so perform, and that even if they failed they were not liable to be ejected. The Court found that they *had* failed, and in condemning them in damages remarked "that it would not in this instance

eject them from the premises, but they are warned that in the event of their being again in default, it will do so peremptorily." In appeal *affirmed. Collective. November*, 30 1858.—*Austin's Rep p.* 213.

Tenant at will of a temple may be replaced by its land-lord.

6. *Kandy D. C. No.* 1,188.—Plaintiff being a mere tenant at will of the Chief Priest (the defendant,) cannot claim to be possessed of any of the produce of the garden in question. Admitting that it was placed in his charge, for the sake of improvement (which however is not proved,) there is nothing that should prevent the official proprietor for the time being from transferring it to other hands at his own will and pleasure. If Plaintiff intended to acquire a more permanent interest in it, he should have taken care to obtain a suitable deed to that effect from the defendant's predecessor from whom he alleges to have received the land. In appeal *affirmed. Per Rough. August*, 16 1834,—*Austin's Rep. p* 12.

Tenant of a temple land cannot maintain an action without joining incumbent priest.

7. *South Court. Kandy No* 13,832.—Plaintiff sued for certain lands which he alleges his deceased father possessed by performance of service to a certain Temple, and obtained judgment for the same in the Court below. In appeal *reversed,*—" the suit must abate for want of the incumbent of the Temple not having been made a party. The assessors are unanimously of opinion that a party holding lands in the manner claimed by the Libel, cannot maintain the suit without the Priest's being cited for his interest of joining in the suit."—*Per Oliphant, January*, 19 1841.—*Austin's Rep. p.* 55.

Burden of proof where there is a difference of opinion as to the nature of tenancy.

8. *Kandy D. C. No.* 27,857.—Plaintiff (a *Basnaike Nileme*) brought this action on behalf of a certain temple to eject defendant from a certain land, the possession of which he had wrested from a tenant at will of the said temple. Defendant admitted that the land was subject to the temple, but alleged that it was his hereditary property, and that so long as he performed the customary services, he could not be ejected therefrom. The Court below held that the burden of proof was on defendant, but his Counsel having refused to call evidence, judgment was entered for plaintiff. In appeal *reversed*, " the Supreme Court being of opinion that there is no admission in the pleadings or examination of defendant, which would justify the District Judge in re-

lieving plaintiff from proof of this case, and calling on defendant to begin."—*Collective. January,* 23 1857.—*Austin's Rep. p.* 198.

Rajakaria prescribed after ten years' adverse possession.

9. *Kandy D. C. No.* 493.—This was an action by a *Ninda* proprietor for services which he claimed from the Defendant as his *tenant,* but which the latter denied his liability to perform. It appeared that the services now claimed had not been performed for upwards of *ten* years. The Supreme Court decided that the Proclamation of the 18 September 1819 barred all actions for the enforcement of services, or to recover possession of land for refusal to perform them, where it had appeared that the party claiming them had allowed ten years to run, without demanding the performance of them. *—*November,* 19, 1833.—*Austin's Rep. p.* 6.

SECTION 9.

(*From Beven and Siebel's Appeal Reports.*)

1. Tenant of a Nilapangua can be ejected for non-performance of service.

Tenant of a Nilapangua can be ejected for non-performance of serivce.

1. Plaintiff as the proprietor of the *Ninda Village* "Paldeniya", complained that the defendant, who was his tenant, failed to perform certain services for three years, and prayed for damages, and to eject him from a field which he held as a *Nillapangua.* The defendant denied that he was a tenant of the plaintiffs, and claimed the field as his free hold. At the trial the plaintiffs endeavoured to put in evidence deeds shewing his title to the Ninda Village. The following are the Judgment of the District Court, and the order made with respect to the reception of the deeds.

Mr. Advocate *Selby,* for the defence, contends that there is no proof that the plaintiff is the proprietor of the Ninda Village in question, or that defendant was ever a Nilakaraya; and that with regard to the non-performance of service, the evidence goes to shew that defendant has acquired a prescriptive title.

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* See *Mar. Judg. p.* 526.

The defendant has destinctly admitted that plaintiff is in possession of a *Muttettu* field in the village *Paldenya,* and that he has cultivated a particular field called Nigalagamapela. The evidence is clear and satisfactory, upon the point that Paldeniya is a Ninda Village, and that the Muttettua in question is cultivated by the Nilakarayas.

I do not consider that it was necessary for the plaintiff to go into the question, as to how he derived his title; and I think that the evidence he has adduced is sufficient for the purposes of this action. He has been proved to be in possession of the Ninda Village. The defendant has been proved to be in possession of certain lands in that village; and he has also been proved and admits (although he says it was in *anda*), that he has frequently cultivated a particular field of the Muttettua. Defendant further admits that he cultivated that very pela about 7 years ago, which brings it to within a year of the time when he is alleged to have ceased to cultivate. A point has been made of the admission that in 1844 a number of the Nilakarayas of this village ceased to perform services. As taken in connection with the evidence, that defendant has never performed any service from the period when he first failed, I do not see the force of this. The plaintiff has nowhere said that the defendant was included amongst those who were sued in the Matale Court; but he has said, that about the time of these cases, the defendant resisted and afterwards made submission. Now, this is in no way inconsistant with the evidence of the witnesses, that he ceased to perform service in 1855.

I think the plaintiff has fairly proved his case, and is entitled to Judgment; and it is deemed that defendant has forfeited his tenancy of the lands in question, and that he be ejected therefrom, paying plaintiff £6 as damages, and costs of suit.—*Bev: & Sieb: Rep. p.* 120.

SECTION 10.

(From Ramanathan's Appeal Reports.)

1. A praveny tenant can alienate his property subject to service.

A praveny tenant can alienate his property subject to service.

Ratnapura. D. C. No. 5636. *Per Curiam* :—The decree of the District court is *affirmed* with costs; but without prejudice to the plaintiff's right to institute a fresh action against the defendants as mere tenants at will, if the plaintiff be advised that he can prove the lands to be held by the defendants under such inferior tenure.

It does not appear on the plaintiff's pleadings in this action that the defendants hold the lands as tenants-at-will, and not as tenants in *praveni* subject to the performance of the services; in which latter case the lands would be alienable by the tenants, although they would continue liable thereon to the same services (*See Marsh. Dig.* 297,300; and *Armour* 266, *) and the plaintiff's counsel admits the claim to be general, and that he is not prepared to aver that the defendants are not tenants in praveni. June 11. 1851,—*Ram: Nath: Rep.* 1843'55 *p.p*: 159—160.

SECTION 11.

(From the Supreme Court Circular.)

Present :—PHEAR, C. J. and DIAS, J.

1. Kandyan Law—Gabadagama—its nature—Ordinance No. 12 of 1848, § 6.

Kandyan Law Gabadagama, its nature—Ordinance No. 12 of 1848, § 6.

Kalutara, D. C. No. 10,497.—This was a suit in ejectment, plaintiff claiming certain *owitla* and *chena* by right of purchase on a deed of sale dated 30th October, 1862. The defendants disputed plaintiff's right and that of his vendor, alleging that the lands belonged to the "Dandinvalaya pangua," half whereof first defendant acquired by purchase, and the remaining half the other defendants acquired by inheritance.

The Crown intervened, to the exclusion of both

* See *Perera's Edition p.* 108.

plaintiff and defendants, and claimed the lands in suit as its own, being waste lands and lying in a *Gabadagama* or royal village, called " Gilimale."

The plaintiff admitted the subject matter of the dispute to be waste land, and situated in a *Gabadagama*, and adduced evidence to shew that he paid tax on two occasions to the Government renter on account of the *chena* and that he himself and his vendor had cultivated both the *chena* and *owitta.*

For the intervenient the Kachcheri Mudaliyar of Ratnapura, who was called as a witness, deposed as follows :—

" Gilmale is a *Gabadagama.* A *Gabadagama* is the exclusive property of the King, and *Koralagama* the property of the inhabitants. When *Rajacaria* was abolished, the commissioners retained the right of Government to exact services from the inhabitants of *Gabadagama, Dewalagama* and *Viharagama. Rajakaria* was abolished more than thirty years ago. It was not exacted regularly from the inhabitants of *gabadagamas,* but during the last thirteen years, to my knowledge, whenever the Governor came to this district services were obtained from the people of Gilimale. The services were such as putting up stables &c. The people under whom plaintiffs claim the lands in dispute were merely the King's *kankanies* whose positions were under the Dissawe, who represented the King. The paddy rent taxation *wattoru* produced by the plaintiff is not a genuine document, as it is not signed by any headman."

And under cross—examination, the witness admitted all the lands at Gilimale were not held subject to the service of the King. There were also other witnesses called, who *inter alia* admitted that it was usual for a number of years for the *wattoru* to be signed by the Gan Arachi, Mohandiram and the taxer, and that the *wattoru* produced by plaintiff had the signature of the then taxer.

The District Judge held, as between plaintiff and defendants, that plaintiff was entitled to both the *Chena* and the *Owita.* In regard to the claim of the Crown, the District Judge found that, though plaintiff had no *Sannas* or grant to support his title, he had yet proved payment of the customary tax twice within the twenty years preceding action, and accordingly the intervention was dismissed with costs.

The Crown appealed.

Cayley, Q. A., for the appellant.

Van Langenberg for respondent.

Cur. adv. vult.

May 14th.—The judgment of the Court was delivered, by *Phear C. J.*, as follows :—

In this case, the Crown claims to have established title to the land, which is the subject of suit, in two ways : first, it says that the land is within the geographical limits of a *Gabadagama*, or royal village, namely, Gilimale, and for that reason is necessarily land belonging to the Crown. And secondly, that it is land such in character as to fall within the scope of clause 6, Ordinance No. 12 of 1848, coupled with the fact that there is not sufficient proof of payment of customary taxes or dues to render the exception of that clause applicable to it.

We think neither of these positions is tenable. It is possible that in some *Gabadagamas* the entirety of the land belongs to the Crown as owner. But we are of opinion that is not as a general rule an incident of all *Gabadagamas* ; and we know of no principle of Kandyan law, which should lead us to hold that the relation of the Crown to the *Gabadagama* is materially different from that of the private owner or lord to the *Nindagama*. The quotation which has been made to us from *Sir J. D. Oyley's* sketch, whatever authority ought to be attached to it, does not assert, but at most suggests, the supposition, that some such difference subsists, and it is remarkable that no judicial ruling, and no acts in exercise of right on the part of the Crown, occurring since the date of the *M S.*, can be cited in support of the supposition.

In this case, the document of title which the Crown puts in seems to specify a service, namely, that of supplying betel to the King's household, as the general condition of tenure in the village, and this at any rate, although not specific, yet, so far as it goes, seems opposed to the contention now made on behalf of the Crown, to the effect, that the cultivators in the village are its tenants at will.

We are also of opinion that the land in question is brought within the exception of clause 6 of Ordinance No. 12 of 1848, by the evidence as to the pay-

ment of taxes. It is admitted on the part of the Crown that taxes, identical in amount with the customary taxes rendered for similar lands, the property of proprietors in the same districts, have been rendered at least once, in respect of the whole land in question within the period of twenty years immediately preceding suit. The Crown itself assessed the tax, and let out the collection of it to a renter in the usual way, and makes no attempt now to account for having done so on any ground of proprietory right, or of mistake. It does not appear certain, though it seems probable on the evidence, that the occasions on which these taxes were rendered were all the occasions on which grain produce was raised on the land. But however this may be, the enactment does not require, for the purposes of the exception, that all the taxes payable during the twenty years should have been actually rendered. It is sufficient if the evidence satisfies the Court that the customary taxes have been rendered for the land *within* the twenty years immediately preceding the date when the claim against the crown comes into contest, and for this we think the evidence in the case is ample.

The decision of the District Judge, so far as it operates to dismiss the intervenient's claim, is therefore *affirmed.—May 7, 1878.—Sup. Court. Cir. Vol. 11. p. 2.*

Section 12.

(*From the Ordinances.*)

1. Different kinds of allotments or shares of land belonging to a temple or a ninda village.—2. Different kinds of tenants attached to a temple or a ninda village.—3. Prescription of personal and commuted services.—4. Prescription of a share subject to service.—5. Remedy against tenant neglecting to perform service or to pay commutation. —6. Praveni tenants cannot be ejected.

Different kinds of allotments or shares of land belonging to a temple or ninda a village.

1. There are two kinds of allotments called *pangu*, appertaining to a temple or a ninda village; namely:

1. A Praveni Pangua.
2. A Maruwena Pangua.

The expression "Praveni Pangua" shall mean an allotment or share of land in a Temple or Ninda vil-

lage held in perpetuity by one or more holders, subject to the performance of certain services to the Temple or Nindagama Proprietor.

The expression "Maruwena Pangua" shall mean an allotment or share of land in a Temple or Nindagama village held by one or more Tenants-at-will.—*Ord. No 4 of 1870 § 3.*

Different kinds of tenants attached to a temple or ninda a village.

2. There are two kinds of tenants attached to a temple or ninda village; namely :—

1. A. Praveni Nilakaraya.
2. A Maruwena Nilakareya.

The expression "Praveni Nilakareya" shall mean the holder of a "Praveni Pangua" in perpetuity, subject to the performance of certain services to the Temple or Ninda Proprietor.

The expression "Maruwena Nilakaraya" shall mean the Tenant-at-will of a Maruwena Pangua.—*Ord. No. 4 of 1870 § 3.*

Prescription of personal and commuted services.

3. Arrears of personal services in cases when the Praveni Nilakareya shall not have commuted, shall not be recoverable for any period beyond *a year.*

Arrears of commuted dues, where the Praveni Nilakareya shall have commuted, shall not be recoverable for any period beyond *two years.—Ord. No. 4 of* 1870 § 24.

Prescription of a share subject to service.

4. If no services shall have been rendered, and no commuted dues be paid for *ten years*, and no action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost for ever, and the Pangua shall be deemed free thereafter from any liability on the part of the Nilakarayas to render services or pay commuted dues therefor.

Provided however that, if at the time of such right of action accruing, the Proprietor shall not be resident within this Island, or if by reason of his minority or insanity he shall be disabled from instituting such action, the period of prescription of such action shall begin to run, in every such case, from the time when such absence or disability shall have ceased.—*Ord. No. 4 of 1870 § 24.*

Remedy against tenant neglecting to perform service or pay commutation.

5. It shall be lawful for any Proprietor to recover damages in any competant court against the holder or holders of any Praveni Pangua who shall not have commuted, and who shall have failed, to render the

services defined in the Registry hereinbefore referred to. In assessing such damages, it shall be competent for the Court to award, not only the sum for which the services shall have been assessed by the commissioners for the purpose of perpetual commutation, but such further sum as it shall consider fair and reasonable to cover the actual damages sustained by the Proprietor through the default of Nilakarya or Nilakareyas to render such personal services at the time when they are due.—*Ord. No.* 4 *of* 1870 § 25.

Praveni tenant cannot be ejected.

6. But it shall not be lawful for any Proprietor to proceed to ejectment against his Praveni Nilakaraya for default of performing services or paying commuted dues: the value of those services or dues shall be recoverable against such Nilakareya by seizure and sale of the crop or fruit on the Pangua, or failing these, by the personal property of such Nilakareya, or failing both, by a sale of the Pangua, subject to the personal services, or commuted dues in lieu thereof, due thereon to the Proprietor. The proceeds of such sale are to be applied in payment of the amount due to the Proprietor, and the balance, if any shall be paid to the evicted Nilakareyas, unless there should be any puisne incumbrance upon the holding, in which case such balance shall be applied to satisfy such incumbrance.—*Ser. Ten. Ord. No.* 4 *of* 1870 § 25.

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